Supreme Court, U.S.
FILED
FEB 8 1993
OFFICE OF THE CLERK

92-1340

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN PERLMUTTER,

Petitioner,

v.

KATHRYN PERLMUTTER,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Is Illinois required by the due process clause of the Fourteenth Amendment to provide a meaningful opportunity for a litigant to raise and have heard an issue concerning the judicial bias and prejudice of a trial judge at that stage of the proceedings when there first emerges a reasonable belief that the trial court was biased and prejudiced?

2. Did the opinion below articulate a view of what constitutes judicial bias and prejudice that is beyond the pale of due process requirements based upon the record in this case?

3. When must a litigant, to preserve the constitutional issue of bias and prejudice of the trial court, raise such issue in the context of a lengthy trial where the bias and prejudice emerges gradually in the latter course of the proceedings?

LIST OF PARTIES

The parties below were: the petitioner Norman Perlmutter, who was the respondent in the Circuit Court of Lake County, Illinois, appellant in the Appellate Court of Illinois, Second District, and petitioner in the Illinois Supreme Court; and the respondent Kathryn Perlmutter, who was the petitioner in the Circuit Court, appellee in the Appellate Court, and respondent in the Supreme Court of Illinois.

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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to the Appellate Court of Illinois, Second District, to review the judgment and opinion of that court entered in the above-entitled proceedings on February 10, 1992.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported at 225 Ill. App. 3d 362, and is reprinted in the appendix hereto at App. 1-29.[1]

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[1] Due to its length, the Appendix to Petition for Writ of Certiorari is printed as a separate document. Numbers in parentheses preceded by "App." refer to Appendix pages.

JURISDICTION

The respondent brought this suit in state court, in the Circuit Court of Lake County, Illinois. On September 12, 1990, the circuit court entered judgment resolving most of the disputed issues. (App. 33-52) On February 28, 1991, after post-trial proceedings, the circuit court entered a final order disposing of the remaining issues. (App. 55-57)

On petitioner's appeal, on February 10, 1992, a unanimous panel of three justices of the Appellate Court of Illinois, Second District, filed its opinion. (App. 1-29) On March 19, 1992, that Court denied Petitioner Norman Perlmutter's Petition for Rehearing. (App. 30) On October 7, 1992, the Supreme Court of Illinois denied Petitioner Norman Perlmutter's petition for leave to appeal to that court. (App. 31) On November 9, 1992, the Supreme Court of Illinois denied Petitioner's motion for leave to file a motion for reconsideration of the order denying petition for leave to appeal. (App. 32) This petition for a writ of certiorari is timely filed within 90 days thereafter.

The jurisdiction of this Court to review the judgment of the Appellate Court of Illinois, Second District, is invoked under Rules 10.1(c) and 13.1 of this Court.

CONSTITUTIONAL PROVISIONS

Petitioner maintains that his rights under the following provisions of the fifth and fourteenth amendments to the United States Constitution were violated by the opinion of the Appellate Court of Illinois:

AMENDMENT V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .".

AMENDMENT XIV:

> Section 1. " . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The petitioner and respondent, husband and wife, were adverse parties in matrimonial litigation in the Illinois courts below. A trial consumed 34 days solely involving issues concerning the disposition of marital property between the parties. Thereafter, the trial judge in a written memorandum awarded respondent assets in excess of $7,000,000 including a money award of $2,415,000 against the petitioner. (App. 61-73)

Then, early in the post-trial proceedings, the trial judge *sua sponte* solicited a petition for sanctions against the petitioner for alleged misconduct during the trial and pretrial proceedings. (App. 120) Contemporaneously, the trial court also *sua sponte* ordered prejudgment interest to accrue on the $2,415,000 money award it had found against the petitioner. (R. C2840; App. 120)[2] The trial court described its order for prejudgment interest on $2,415,000 as a "kicker." (R. 5228-29)[3] The fee sanction hearing was held 5½ months later and prejudgment interest in excess of $100,000 had then accrued.

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[2] Numbers in parentheses preceded by "R." refer to the trial court report of proceedings; numbers in parentheses preceded by "R. C" refer to the trial court common law record.

[3] The trial court stated that it was aware that under Illinois law the judgment was not final or appealable until the sanction proceeding the court initiated was entirely concluded. (R. 5227-28) *In re Marriage of Leopando*, 78 Ill. 2d 114, 120, 449 N.E. 2d 137 (1983). (The trial court nevertheless required the petitioner to post a substantial appeal bond with surety or to face a levy as though the judgment were final. (R. C2932))

At the sanction proceeding, no evidence was offered by the respondent relating or tracing any of the respondent's costs, attorney's fees or damages to any litigation conduct of the petitioner. After all proofs were closed in the sanction proceeding, and during the final argument, the petitioner urged that the respondent's failure to connect any of the allegedly sanctionable conduct to any of respondent's legal fees or costs was a flaw in respondent's proof and a fatal defect in her claim for attorney's fees. (App. 120-21) The trial court from the bench immediately responded by criticizing the petitioner for failure to adduce in cross-examination information helpful to the respondent's case and then *sua sponte* declaring a "mistrial", ordering a *de novo* sanction proceeding. (App. 123)

At the new sanction hearing the respondent's additional evidence was an exhibit that had been prepared shortly before and especially for those proceedings. (App. 124-25) The exhibit purported to enhance and interpolate the respondent's counsel's contemporaneously made time entries by attempting to, after the fact, apportion general time entries against the claimed acts of sanctionable conduct. (App. 124) This exhibit was admitted in the second and *de novo* sanction hearing over the petitioner's objection. (App. 125-26) The trial court then, in a written memorandum, sanctioned the petitioner for eleven separate grounds of misconduct and entered a sanction judgment of $80,950 against the petitioner in favor of the respondent. (App. 77-81) The trial court did not allocate between the eleven acts sanctioned any specific amount for each act. (App. 77-81)[4]

[4] Illinois law provides that damages in the form of costs and fees must be directly connected to each of the sanctionable acts. *Berkin v. Orland Park Plaza Bank*, 191 Ill. App. 3d 1056, 1063, 548 N.E. 2d (1st Dist. 1989).

The petitioner was sanctioned for four acts that were never described or identified by the trial court with any particularity or specificity: a sanction for a "failure to produce certain documents and witnesses" never further identified or enumerated by the trial court; a sanction for raising a "spurious" tax issue, which issue was never identified or enumerated by the trial court; a sanction for a "debacle" at a particular deposition but the "debacle" was never identified or described; and a sanction for late, incomplete, and confusing answers to interrogatories concerning experts, again with no further enumeration whatsoever. (App. 80)

The petitioner was also sanctioned for failing to volunteer information about a lawsuit involving a hotel that the court had declared a marital asset (App. 80); the respondent had never sought such information from petitioner and never examined the information when it was made available (R. C2940-41).

Petitioner was sanctioned for questioning the details of respondent's Aspen condo winter vacation rental arrangement that the petitioner was ordered by the court to pay (App. 56, 80). It appeared from that rental arrangement that respondent may have artificially increased the size of the rental obligation to be imposed upon petitioner. (App. 107-10) Petitioner was also sanctioned for raising an issue about obtaining psychiatric treatment for a minor child (App. 56, 78-9) (who the court found, *before* the sanction was imposed, did in fact need psychiatric treatment) (App. 119); and petitioner was sanctioned for conduct that became misconduct only after the trial court in its sanction memorandum *sua sponte* reversed itself and declared that the particular conduct once declared by it as proper (App. 75-6) was now improper (App. 77-8).

The trial court's sanction opinion also severely criticized petitioner, the court finding that he had engaged in "tactics designed to confuse, deplete and distract" (App. 77) and that he had sought to "delay and obstruct" the proceedings (App. 79). The memorandum also praised respondent's counsel for their conduct and efforts during both the trial and pretrial proceedings. (App. 79, 81)

The trial court's sanction memorandum and order terminated the trial proceedings and the cause was then final and appealable under Illinois law; an appeal was taken by petitioner immediately. (R. C3118-44) Petitioner's appeal of right was to the Appellate Court of Illinois, Second District, and he there urged that the trial court's bias and prejudice denied him a fair trial. The Appellate Court held in its written opinion that the petitioner was precluded from raising the issue of bias and prejudice on appeal by his failure to assert that issue in the trial court during the trial on the merits or early in post-trial proceedings.[5]

The Appellate Court declared that the petitioner's claim of prejudice on the part of the trial court cannot "serve as the basis for a new trial." (App. 28) The Appellate Court's opinion held that conduct even though petitioner claims it to have been "focused only upon the end result of sanctioning . . . without regard to legal procedure or [petitioner's] rights" cannot serve as a basis for constitutional error based upon bias and prejudice. (App. 28) The Appellate Court held in its opinion, without any detailed

[5] The petitioner contended that the evidence of the trial court's bias and prejudice only became unambiguously apparent at the very conclusion of all the trial court proceedings and could not in good faith have been raised any earlier.

discussion of the trial court's conduct, rulings, and comments, that the petitioner was not deprived of a fair trial. (App. 29)[6]

A petition for rehearing to the Appellate Court urged a denial of due process because the petitioner had been refused any meaningful opportunity whatsoever to ever raise the issue of judicial bias and prejudice. The Appellate Court without opinion denied the petition for rehearing. (App. 30)

The Supreme Court of Illinois declined to grant its discretionary petition for review (App. 31) and subsequently denied a rehearing to reconsider its refusal to grant an appeal (App. 32). In both his petition for leave to appeal to the Supreme Court of Illinois and the request for rehearing, the petitioner urged that the issue of the trial court's bias was a due process issue and petitioner in derogation of his constitutional rights was denied effectively the opportunity to raise the issue.

REASONS FOR GRANTING THE WRIT

I. REASONS FOR HEARING A MATRIMONIAL CASE.

We seek certiorari in a matrimonial case fully aware that the Court, being daily occupied with immense and wide-sweeping issues involving significant public policy questions, rarely hears divorce matters. Nevertheless, we believe and respectfully urge that the instant matrimonial case commends itself to review by this Court because it presents an important issue concerning the administration of justice.

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[6] The Appellate Court did, however, reverse the trial judge on the merits and ordered substantial additional proceedings but without requiring any change in the trial judge. (App. 29)

This Court as part of its constitutional function manifestly has the ultimate responsibility for supervising the due process conduct of the nation's courts, both state and federal. U.S. CONST., art. 3; *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978). As the Court is certainly aware, the country has suffered a national litigation explosion that imposes enormous pressures on the resources of the state courts as well as the federal judiciary.[7]

In the state courts, the litigation explosion has resulted in a substantial number of new judges ascending to the bench who are not always as experienced or sophisticated as their predecessors and who are often immediately assigned cases involving matters that may not have been within their previous professional exposure or experience.[8]

In many of the states, and particularly in large urban areas, one of the largest and most often congested dockets confronting the trial courts is the matrimonial docket where cases are heard that involve divorce and marital

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[7] Cullen, As Lawsuits Stall, More Disputes Go Private, The Boston Globe, Nov. 11, 1991 (National/Foreign), at 1; Court Statistics Project of the National Center for State Courts (1992); Joseph Kelner and Robert S. Kelner, The Courts in Crisis, New York Law Journal, Sep. 24, 1991, at 3; Matthew T. Crosson, Judicial System Facing a Financial Crisis, New York Law Journal, May 6, 1991 (Supreme Court of the State of New York; Tricentennial), at S-7.

[8] Karen Levine, State Judges Found to be Underpaid, Overworked; Low Pay Means Fewer Judicial Applicants, Massachusetts Lawyers Weekly, Nov. 30, 1992, at 3; Simon, Upset Victor Is Settling Into Court—"He's Not The Oddball I Thought He Was," The Seattle Times, Aug. 25, 1991 (Northwest), at B1; Size of Federal Judiciary Threat to Quality, The Connecticut Law Tribune, Nov. 4, 1991 (Verbatim), at 3.

property rights, child custody and support rights, etc.[9] Matrimonial cases by their very nature publicly air private, intimate questions concerning the conduct, lifestyle, and problems of litigants in every stratum of society; axiomatically, such cases concern and determine individual, family and business lives in a personal way matched by almost no other litigation. Moreover, a single matrimonial case can impact in ripple effect on the lives of many individuals and families aside from the immediate parties so the sweep and interest in a matrimonial case is often far beyond the actual parties in court.

Although not perhaps capable of empirical proof, it is probable that (save for possibly traffic court) the majority of persons in the United States who are exposed to any court system directly or indirectly have such exposure with a matrimonial case. Accordingly, the public's confidence in the judicial system can be especially and profoundly impacted and adversely affected if matrimonial courts are perceived as not always affording fair and impartial treatment in their conduct and determinations. Nevertheless, in the urban areas, it is often in the matrimonial courts that the most junior and least experienced judges are assigned; and they preside over glutted dockets, with overworked staffs and in crowded and depressing courtrooms, constantly hearing and adjudicating sad and tragic family issues sometimes in turnstile fashion.[10] And it is readily understandable and foreseeable that in any milieu of a docket with a crush of cases and emotionally-

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[9] Jay Romano, Divorce Logjam Leads to Alternatives, New York Times, Jul. 26, 1992 (13NJ), at 1, col. 2.

[10] H. Downs, Deadly Decisions, ABC News 20/20, Aug. 21, 1992.

charged issues and parties, fundamental due process guarantees are often unwittingly ignored and not observed.[11]

Plainly, the ultimate safety valve ensuring that the nation's divorce courts remain sensitive and faithful to fundamental constitutional guarantees and therefore administer justice and do not erode confidence in the legal system is the Court's enforcement of constitutional due process guarantees. We submit that an opinion of this Court concerning procedural due process requirements in the context of a matrimonial case could have a greater positive impact on the daily operation of those courts than perhaps any of the myriad of suggestions constantly being advanced to improve the country's divorce courts.[12] We believe that the instant case presents an opportunity for this Court to do so; the case raises a serious issue of the boundaries of procedural due process in the context of judicial bias that would have application generally.

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[11] Slate, Federal Courts: An Exhaustible Resource, The Recorder, Mar. 2, 1992, at 10; Dennis C. Kolenda, Michigan Lawyers Weekly, Apr. 29, 1991 (This Week's Opinions; Michigan's Most Respected Judges), at 25; William R. Dalsimer, What Kind of Justice in Family Courts, New York Law Journal, Feb. 11, 1991 (Letters to the Editor), at 2.

[12] Susan Roberts Boyle, Proposed Family Law Bill Gets Thumbs Down From Bar; Lawyers See Delays, Constitutional Issues, Massachusetts Lawyers Weekly, Nov. 2, 1992, at 2; Parents' and Children's Rights Group Demonstrates For Legal Reform; Changes in New York Courts With Abuse and Abrogation of Parents' Rights, PR Newswire, Jul. 6, 1992 (State and Regional News); John Blake, De-fanging Divorce; Capitol Vigil Held to Urge New Laws for Children's Sake, Atlanta Journal and Constitution, Jan. 13, 1992 (State News, C) at 2; Court Reform and Children: Beware of False Expectations, Massachusetts Lawyers Weekly, Dec. 2, 1991 (Editorial), at 4.

II. THE TRIAL COURT'S BIAS AND PREJUDICE EMERGED ONLY AT THE END OF THE CASE.

The petitioner urged below that a serious bias and prejudice by the trial court against him first emerged at the very end of post-trial court proceedings, months after the case on the merits had been decided. There is no claim by petitioner that the conduct of the trial on the merits would sustain any good faith claim that the lower court had bias or prejudice against the petitioner.[13] Instead, the question of judicial bias began to suggest itself to petitioner *after* the trial and after the decision on the merits had been rendered by the lower court (App. 33-52). The petitioner's concern first arose when the lower court in post-trial proceedings gratuitously invited sanction proceedings against the petitioner. (App. 120) Moreover, that post-trial invitation by the trial court was coupled with the trial court's simultaneous and *sua sponte* ordering that prejudgment interest on a $2,415,000 cash award against petitioner begin to accrue immediately. (R. C2840) This double-pronged spontaneous judicial action, we submit, would clearly cause almost any litigant concern about a trial court's possible partisanship; however, standing alone the conduct is plainly insufficient to justify a claim of bias or prejudice.

Also, at the sanction proceeding prior to the close of proofs, the trial court's actions did not create justifica-

[13] The petitioner did present to the Appellate Court that during the trial the trial judge was permissive of inappropriate behavior of respondent's counsel. The petitioner did not claim that this permissiveness by the trial court revealed bias and prejudice during the trial but, rather, cited it to the Appellate Court solely to contrast the trial court's last day fulsome praise of respondent's counsel and sharp criticism of petitioner's counsel (in the sanction memorandum) (App. 79, 81).

tion sufficient to raise the claim that the trial court had bias or prejudice against petitioner. However, *after* all proofs were closed in the sanction proceeding and during the closing argument, the trial court *sua sponte* ordered a mistrial to permit respondent to cure fatal flaws in her proof; those flaws in respondent's proof had been urged to the trial court by petitioner in the closing argument (App. 121-23). Pursuant to the trial court's *sua sponte* order, a second and *de novo* sanction hearing then ensued. In that second sanction proceeding, the trial court admitted in evidence, over objection, a spurious self-serving document prepared by respondent for the hearing and to cure the defect in damage proof that had been raised by petitioner in the closing argument of the first sanction proceeding (App. 124-25); the exhibit was then used by the trial court in preparing its memorandum sanctioning petitioner.[14]

The trial court in its sanction memorandum found an inordinately large number of sanctions against petitioner (eleven); the memorandum also gratuitously heaped substantial praise upon opposing counsel and in very general terms sharply chastised petitioner. The trial court in a number of instances sanctioned petitioner without any definitive findings or description as to the particular acts being condemned and punished by the trial court. Indeed, we submit that no one after reading the trial court's sanction memorandum as to at least four sanctions (App. 79-80)

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[14] The respondent's counsel had sought to put the contents of the document in question into the record during the closing argument of the first sanction proceeding upon hearing petitioner's presentation that the respondent's proof was defective. (App. 122) Petitioner's objection to such an unusual attempt prompted the trial court to immediately grant a mistrial (App. 123); respondent in the second proceeding was then able to place the document in evidence (App. 124-25).

could possibly know or ascertain the precise reasons or behavior for which petitioner was being sanctioned—even though in Illinois sanctions are penal in nature to the litigant (*Harris v. Harris*, 196 Ill. App. 3d 815, 829, 555 N.E. 2d 10 (1st Dist. 1990)) and sanction findings must be very specific as to the conduct being punished (*Berkin v. Orland Park Plaza Bank*, 191 Ill. App. 3d 1056, 1063, 548 N.E. 2d 534 (1st Dist. 1989)). Instead, the trial court's opinion alludes to a failure by petitioner to produce documents or witnesses (never identified); to wrongful behavior of petitioner in raising a spurious tax issue never articulated by the trial court; to petitioner's filing, in connection with discovery involving experts, insufficient interrogatory answers with no further amplification by the court; and to a deposition "debacle" without further findings.

Petitioner was also sanctioned for seeking a transfer of venue to Cook County, Illinois, from Lake County, Illinois, early in the trial court proceedings. He had urged two grounds for this transfer motion: (1) *forum non conveniens* and (2) an express agreement between counsel for the parties to litigate the case in adjoining Cook County. (App. 83-5, 86-8) The trial court on October 11, 1988, denied petitioner's motion and in a written opinion held that the issue of *forum non conveniens* was a very close question. (App. 75) However, the court then held that petitioner's claim of an agreement between opposing counsel to litigate in Cook County was made without any reasonable inquiry or factual basis and that sanctions would accordingly be imposed solely *for urging this contention* (App. 75-6).[15]

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[15] The petitioner's lawyers in the Cook County action, Peer Pedersen and Mark Janser, both had in fact testified under oath

(Footnote continued on following page)

Two and one-half years later, at the post-trial sanction proceedings, the respondent, in claiming legal fees for the transfer motion, made no attempt to divide the fees incurred as between the *forum non conveniens* issue and the agreement-of-counsel issue; counsel's time sheets were never so maintained or organized despite the trial court's 1988 ruling. (App. 121-23, 124) The trial court in its sanction memorandum cured this failure of respondent's proof by *sua sponte* reversing its 1988 ruling that petitioner had reasonable grounds to seek a transfer on *forum non conveniens* grounds and holding that the petitioner's entire venue transfer motion was sanctionable for being without good cause: the trial court in its sanction memorandum ordered the petitioner to pay *all* of respondent's fees and costs for the entire venue proceeding. (App. 77-8)

In still another sanction, the trial court had ordered the petitioner to pay a one-week leasing cost for a condominium respondent rented in Aspen, Colorado, during a winter vacation break. The respondent, however, leased the vacation condominium for *two* weeks and the total rental was approximately $11,000. Respondent unilaterally arranged that her week's rental cost would be $1,500 while the rental week the petitioner was to pay would be $9,450. (App. 107-110) The petitioner, upon discovering the arrangement, questioned its fairness and propriety; the trial court ruled against the petitioner on the merits and required petitioner to pay in full for the $9,450 week. (App. 71)

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[15] *continued*
to the court below at the venue hearing that they had such an agreement with respondent's attorneys, Mr. DuCanto, Mr. Fleck and Mr. O'Brien. (App. 99-101, 101-03; compare App. 103-06) The petitioner had no other source of information to which he could inquire. Nevertheless, the trial court found that the petitioner had not investigated and had no basis for his claim. (App. 75-76)

In its sanction memorandum the trial court *sua sponte*, and without any pleadings by respondent claiming that petitioner was guilty of misconduct (R. C2861-81, R. C2882-84), ruled that the inquiry into and challenge of this disparate rent arrangement was sanctionable behavior (App. 80-81).

And, in still another instance, petitioner was sanctioned for seeking a court order directing psychiatric treatment for a minor child (App. 78-9), even though much earlier and during the trial on the merits, the trial court acknowledged that the child did need such treatment and ordered it (App. 118-19).

The Illinois law declares that sanctions are not a punishment by fine but rather are awarded *only* to recompense a litigant for actual damage suffered by the offending behavior of an adversary party.[16] However, the trial court in rendering sanctions against petitioner stated concerning the purpose of its actions:

> * * * it's not merely to compensate Mrs. Perlmutter for the additional attorneys' fees that she may have had to expend, but it's for the administration of the

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[16] In Illinois, while sanctions pursuant to Supreme Court Rule 137 and its statutory predecessor, §2-611 of the Code of Civil Procedure (Ill.Rev.Stat., ch. 110, ¶2-611) are penal in nature, nevertheless a trial court should not impose sanctions intended primarily as punishment. See *Hardware Wholesalers, Inc. v. Clemenic*, 124 Ill. App. 3d 304, 308, 464 N.E. 2d 700 (1st Dist. 1984); *Cedrick Spring & Associates, Inc. v. N.E.I. Corp.*, 181 Ill. App. 3d 1031, 1035, 401 N.E. 2d 352 (2d Dist. 1980). It is not the purpose of Rule 137 or §2-611 to penalize litigants simply because they have been unsuccessful in the litigation (*In re Marriage of Sykes*, 231 Ill. App. 3d 940, 946, 596 N.E. 2d 1226 (4th Dist. 1992)) or because an argument or theory of recovery is found to be unjustified (*Lecrone v. Leckrone*, 220 Ill. App. 3d 372, 378, 580 N.E. 2d 1233 (1st Dist. 1991)).

> system and the way lawyers conduct themselves in this court. * * * So it's beyond just sanctions for recompensing Mrs. Perlmutter. (App. 123)

We submit that only after the trial court's sanction memorandum and order were mirrored against *all* of the trial court's actions from the time of initiating sanctions against the petitioner, that the petitioner manifestly first had a reasonable and a good faith basis for believing that the trial court bore bias and prejudice. It was at the very end of the proceedings that the totality of all the trial court's conduct, coalescing in the sanction memorandum, finally presented a clear, maintainable claim that the trial court had assumed an adversarial posture and was intent upon substantially punishing petitioner regardless of what the actual proof or evidence might turn out to be. See *In re Murchison*, 349 U.S. 133, 136 (1955). In other words, at the moment the case ended, petitioner could first reasonably conclude that the trial court bore such bias that sanction proceedings were from their inception a hollow and meaningless formality preliminary to punishment; the trial court had no concern with procedure, the law or the evidence in terms of judging the petitioner, thereby infecting the trial court's holding on the merits.[17]

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[17] Stephen Katz, one of respondent's attorneys, filed a fee petition pursuant to an Illinois statute ("a 508 petition") permitting the court to apportion respondent's attorney fees between the parties based on ability to pay (Ill. Rev. Stat., ch. 40, sec. 508). (R. C2882-84) The court, however, had previously ruled it would disallow all sec. 508 fee petitions. (App. 120) On the last day of the second sanction proceeding after all proofs closed and after the petitioner's counsel advised the court that the Katz petition requested no fees based on sanctions and was a 508 fee petition, the trial court immediately allowed Mr. Katz to amend his 508 petition on its face, allowing allegations of apportionment of fees and the ability to pay to stand as sanction allegations. (R. 5612)

(Footnote continued on following page)

III. THE ILLINOIS APPELLATE COURT IN VIOLATION OF THE DUE PROCESS CLAUSE DENIED PETITIONER ANY OPPORTUNITY TO PRESENT HIS CLAIM OF BIAS.

The Illinois Appellate Court disallowed petitioner's claim of bias and prejudice as waived for failure to raise the issue of bias and prejudice to the trial court (App. 27). The Illinois Appellate Court's opinion implicitly in its holding recognizes that there could be no waiver based upon petitioner not raising such claim to the trial court on the final day of the case (after the sanction memorandum was rendered); presenting the issue then would have been an obvious futility and purposeless. However, and most curiously, the Appellate Court's opinion does hold that the issue of judicial bias and prejudice *was* waived because petitioner had not raised the claim *during* the trial on the merits or early in the post-trial proceedings before the sanction proceedings ever commenced. (App. 26-27) But at both of those junctures in the proceedings the trial court's bias was not reasonably clear or demonstrable by a responsible litigant; the trial court's conduct at those focal points in the proceedings could have merely been the product of judicial error. Thus, raising the issue of bias and prejudice at the times ruled necessary by the Illinois Appellate Court's opinion to preserve the point and avoid a waiver would not only have been a premature raising of the issue, a diversion of the trial proceedings and resources, and inappropriate as not ripe but could well have exposed petitioner to sanctions for chal-

---

[17] *continued*
The court thereafter allowed as sanctions against the petitioner the fees Mr. Katz had sought under section 508 (App. 80-81) even though sanction conduct and fees bear almost no relationship whatsoever to a section 508 claim for fees.

lenging the trial court without good cause or a proper factual basis. *In re Marriage of Sykes*, 231 Ill. App. 3d 940, 946, 596 N.E. 2d 1226 (4th Dist. 1992) And the Appellate Court's opinion in so holding is in actuality, albeit in the guise of holding a waiver, effectively denying petitioner *any* opportunity to raise the issue of bias and prejudice of the trial court; the consequence of its holding is a waiver unless made at a time when the point *cannot* be made for a lack of reasonable basis. And, indeed, when the bias and prejudice issue does finally ripen to be responsibly presented, the Appellate Court finds a waiver for not having been raised earlier (when it could not have been in good faith raised).

A holding or doctrine that in practical effect precludes a party from ever being able to present a valid due process claim here because the party is always either too early or too late and never timely, is constitutionally impermissible. *Young v. Ragen*, 337 U.S. 235, 238 (1949). This Court long ago condemned Illinois' procedure that became in actual operation a procedural bar precluding a litigant from ever presenting his constitutional claim. *Marino v. Ragen*, 332 U.S. 561, 564 (1947) (Rutledge, J., concurring). The issue of judicial bias and prejudice can only be presented by a litigant at that point in the proceedings when there appears justifiable grounds to present the issue and constitutionally cannot be judicially foreclosed because of not raising the issue when it is premature. *See also Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992). The Court has never spoken on this issue. But the administration of justice requires that litigation proceed in an orderly fashion consonant within the pleadings and that there be a minimum of trial time expended raising premature constitutional issues collateral to the merits; public policy requires discouraging the early raising of such claims solely to ensure preserving points and avoiding a waiver.

Finally, the Illinois Appellate Court's opinion, without any discussion or making any finding whatsoever as to whether any of the trial court's conduct displayed any bias or prejudice, simply declared that petitioner did receive a fair trial. (App. 27-29) Seemingly, the Appellate Court's opinion was never focused on the sum totality of the inferences and consequences of the trial court's post-trial conduct, particularly its provoking and then adjudicating a sanction proceeding against petitioner that resulted in a remarkable number of sanctions against petitioner. Indeed, the Illinois Appellate Court's opinion even appears to hold that assuming the trial court was in fact intent upon sanctioning petitioner without regard to his rights or to legal procedure, nevertheless such trial court's conduct does not entitle petitioner to claim that he was denied a fair trial. (App. 27-28) The Appellate Court, we submit, most incorrectly has held that a proceeding can be constitutional and within the bounds of the Fourteenth Amendment *even* if the trial court conducts itself without regard to a litigant's rights or accepted legal procedure.[18]

CONCLUSION

We ask that this Court grant certiorari and review the proceedings below and then declare that procedural due process mandates (a) that there is a secured right to raise an issue of fair trial based upon judicial bias and prejudice

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[18] *In re Murchison*, 349 U.S. 133, 136 (1955). Biased decision-makers do not satisfy procedural due process. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial * * *." Holmes, *Frank v. Mangum*, 237 N.S. 309, 347 (1914). *See also Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992).

at that point in the proceedings that a litigant has a good faith, reasonable basis for believing that the trial court has bias and prejudice and (b) that the Appellate Court of Illinois' opinion was constitutionally incorrect in terms of procedural due process in precluding petitioner any meaningful opportunity to present this issue by fashioning an erroneous concept of waiver that effectively bars a litigant from ever having this issue of trial bias heard.

Respectfully submitted,

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92-1340

Supreme Court, U.S.
FILED
FEB 8 1993
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN PERLMUTTER,

Petitioner,

v.

KATHRYN PERLMUTTER,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois, Second District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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NORMAN PERLMUTTER,

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v.

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App. 1

[Filed February 10, 1992]

No. 2-91-0254

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re MARRIAGE OF KATHRYN PERLMUTTER,	)	Appeal from the Circuit Court of Lake County.
Petitioner-Appellee,	)	
and	)	No. 87-D-2204
NORMAN PERLMUTTER,	)	Honorable Jane D. Waller Judge, Presiding.
Respondent-Appellant.	)	

JUSTICE BOWMAN delivered the opinion of the court:

Respondent, Norman Perlmutter (Norman), appeals from several orders entered by the circuit court of Lake County relating to issues surrounding the dissolution of his marriage to petitioner, Kathryn Perlmutter (Kathryn). Norman alleges the following instances of error: (1) the trial court's classification and valuation of marital and nonmarital property was improper; (2) the court's distribution of marital property was improper; (3) the court's child support award was excessive and therefore improper; and (4) the court, as evidenced by various acts and orders, was biased and prejudiced against Norman.

The parties were married on January 20, 1978, and had two children during their marriage. Kathryn filed her peti-

tion for dissolution of marriage on October 21, 1987. After a lengthy trial, the trial court rendered a written letter opinion on July 27, 1990, and entered a written judgment of dissolution in conformity with the letter opinion on September 12, 1990. The court in its September 12 order also granted leave to the parties to file petitions for attorney fees. On October 10, 1990, the trial court amended its September 12 order and otherwise denied the parties' post-trial motions to reconsider. On October 12, 1991, Norman filed a notice of appeal from the orders of September 12 and October 10. This court, on October 30, 1990, dismissed Norman's appeal for want of a final and appealable order. On February 28, 1991, pursuant to and in conformance with a written letter opinion, the trial court entered an additional money judgment against Norman for attorney fees and sanctions. Norman filed his notice of appeal on the same day. Kathryn also filed a notice of cross-appeal, but she has not pursued the matter.

The total value of the property involved in this case appears to be well over $20 million. The record on appeal fills eight boxes. Due to the nature of the case, and due also to the fact that Norman has provided us with an argumentative statement of facts (see 134 Ill. 2d R. 341(e)(6)), we will summarize those facts necessary to resolve the issues presented as those issues are addressed.

We first consider Norman's contention that the trial court's classification and valuation of certain marital and nonmarital property was improper. Section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act) (Ill. Rev. Stat. 1989, ch. 40, par. 503) sets forth the guidelines to be consulted in determining whether property is classified as marital or nonmarital. In this regard, section 503 provides in pertinent part as follows:

"§503. Disposition of property. (a) For purposes of this Act, 'marital property' means all property acquired by either spouse subsequent to the marriage, except the following which is known as 'non-marital property':

(1) property acquired by gift, legacy or descent;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties;

(5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;

(6) property acquired before the marriage;

(7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

(b) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy,

> tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section." (Ill. Rev. Stat. 1989, ch. 40, par. 503(a), (b).)

A trial court's classification of property as marital or nonmarital will not be disturbed unless contrary to the manifest weight of the evidence. *In re Marriage of Landfield* (1991), 209 Ill. App. 3d 678, 689.

The trial court, in its July 27, 1990, letter opinion and September 12, 1990, judgment of dissolution, classified and distributed the parties' property as follows:

ITEM Classified Nonmarital	VALUE	AWARDED TO
Finley Company Stock Proceeds	$ 2,309,799 (less $28,000 reimbursement to marital estate)	Kathryn
Sumac Residence	No assigned value	Kathryn
Jewelry	No assigned value	Kathryn
Egandale Residence	$ 2,800,000	Norman
Wau Account	$ 475,000	Norman
Sikes Account	$ 515,000 (less $427,000 reimbursement to marital estate)	Norman
Sikes Partnership Interest	$ 131,000	Norman
La Salle Lake Investors Partnership	$ 33,000	Norman
Ferrari Automobiles	$ 325,000	Norman
Artwork	$ 49,500	Norman
Chris Craft Stock	$ 251,770	Norman

ITEM Classified Marital	VALUE	AWARDED TO
Scott Street Residence (and forgiveness from $911,000 note)	$ 1,150,000	Kathryn
Snowmass Residence (subject to $987,000 mortgage)	$ 2,200,000	Kathryn
Midtown Bank Account	$ 175,213	Kathryn
Midtown Bank Account	$ 560,060	Kathryn
Mayfair Investment Account	$ 543,000	Kathryn
Certain artwork	$ 65,000	Kathryn
Forgiveness of obligation to reimburse marital estate	$ 28,000	Kathryn
Various automobiles	No assigned value	Kathryn
Slope 103	$ 13,000	Norman
UTV Stock	$ 70,000	Norman
Certain artwork	$ 44,000	Norman
B. Perlmutter loan	$ 35,000	Norman
Interest in Heitman Financial, Ltd.	$ 4,420,000	Norman
Interest in Mayfair Regent Hotel (New York)	$ 6,350,000	Norman
Interest in remaining assets of HC Partnership	No assigned value	Norman
Forgiveness of obligation to reimburse marital estate for dissipation	$ 1,127,193	Norman
Forgiveness of obligation to reimburse marital estate from Sikes account	$ 427,000	Norman

Forgiveness of obligation to reimburse martial estate for improvements to Egandale residence	$ 1,633,569	Norman
Sheridan Road Condominium	No assigned value	Norman
Interest in sailboat	No assigned value	Norman
Various automobiles	No assigned value	Norman

The trial court, in order to achieve a 40% distribution of marital assets to Kathryn, then ordered Norman to pay to Kathryn the sum of $3,415,000, plus interest at the rate of 9% per annum. The court stated that Kathryn would be responsible for the mortgage on the Snowmass condominium. In its October 10, 1990, order, however, the trial court amended its September 12 judgment order to the effect that Norman would be responsible for the Snowmass mortgage and further that the $3,415,000 due to Kathryn from Norman would be reduced accordingly to $2,415,000.

Specifically, Norman contends that the trial court erred in the classification and valuation of certain property when it (1) found that his interest in H.C. Partnership was marital property; (2) found that, even if Norman's interest in H.C. Partnership was nonmarital, the individual assets of the partnership would qualify as marital property; (3) accepted Kathryn's experts' appraisal values for Heitman Financial, Ltd., and the New York Mayfair Regent Hotel; and (4) found that funds in various investment accounts were Kathryn's nonmarital property.

Norman first contends that H.C. Partnership was formed prior to the parties' marriage and, therefore, his interest in H.C. is nonmarital. Kathryn argues that the partnership was not formed until after the parties were married, in 1978, as evidenced by the fact that the partnership did

not file a tax return for 1977, and the 1978 tax return failed to show any money in any partners' capital accounts.

Testimony at trial indicated that, when Norman met Kathryn on September 1, 1977, he was the chief executive officer of Heitman, a real estate company. At that time, Norman was on the board of directors of Cordura Corporation, a New York stock exchange company that owned Heitman. Norman was also on the board of directors of Chris-Craft Industries. The day after Kathryn met Norman, Cordura publicly announced that it was selling Heitman to a group of investors, including Norman. Norman had originally purchased Heitman in 1966, but sold the company to Cordura in 1969.

In the fall of 1977, Norman led a group consisting primarily of Heitman management individuals to repurchase Heitman from Cordura. Negotiations began in June 1977, and Cordura in September 1977 made a public disclosure of the impending sale. The transaction closed in November 1977, with Cordura announcing the consummation of the sale and filing the required SEC reports. As the trial court found, H.C. Partnership was initially formed, in 1977, to acquire stock in Heitman Financial Services, Ltd., the corporation which purchased the Heitman Group from Cordura. Heitman's acquisition was structured as a purchase of assets. Heitman Financial, Ltd., acquired Heitman's assets from Cordura and continued the business. The purchase price was $10,250,000. $250,000 of the purchase price was paid in cash to Cordura by the new stockholder group. The new Heitman corporation paid Cordura the remaining $10 million with a Heitman corporate note. The $10 million corporate note was secured by a pledge of the acquired assets.

In support of his position that H.C. was a partnership in which he obtained an interest prior to the marriage, Norman introduced a stock certificate representing shares of stock issued by Heitman Financial Services, Ltd., in November 1977 to H.C. and a copy of a partially executed H.C. partnership agreement dated November 4, 1977. In May 1978, after the parties' marriage but prior to any marital discord, the H.C. partners executed an amendment to the H.C. Partnership agreement that contained a recital stating that the original agreement had been executed on November 4, 1977. After the parties' marriage, H.C. acquired other investments in addition to Heitman, such as the Mayfair Regent Hotel in Chicago, the Mayfair Regent Hotel in New York, real estate ventures known as Wilshire Normandie, La Salle Arcade, MAF Associates, and a condominium apartment in Snowmass Village, Colorado, known as Slope 103.

Regarding the classification of H.C. Partnership, the trial court, in its July 26, 1990, letter opinion, stated as follows:

> "H.C. Partnership is an investment partnership. It was initially formed to acquire stock in HFSL, the corporation which purchased the Heitman Group from Cordura prior to the marriage. A stock certificate representing shares of stock issued by HFSL in November, 197[7] to H.C. and a copy of a partially executed H.C. partnership agreement were produced by Mr. Perlmutter in support of his position that H.C. was a partnership in which he obtained an interest prior to the marriage. Nevertheless, the existence of H.C. as an operating entity was not established until sometime in 1978 after the marriage. Mr. Perlmutter has not met his burden of proving that he has a nonmarital interest in H.C. and its assets."

We agree with Norman that his interest in H.C. Partnership is nonmarital property. In Illinois, the existence of a partnership relation is a question of intent to be gathered from all the facts and circumstances. (*In re Marriage of Kamp* (1990), 199 Ill. App. 3d 1080, 1083.) In *Kamp*, the evidence indicated that a partnership known as Kamp Brothers was in existence prior to 1981, when the parties in that case were married. The evidence also indicated, however, that the brothers' agreement was oral and that they did not file tax returns for the partnership prior to 1981. Nevertheless, the court concluded that "the mere fact that the brothers had not entered into a formal written partnership agreement or filed Federal partnership tax returns prior to 1981 does not defeat a finding that a farming partnership existed prior to the parties' marriage." (*Kamp*, 199 Ill. App. 3d at 1083.) We believe the situation here to be analogous and likewise conclude that the alleged defects noted by Kathryn do not require a finding that H.C. Partnership did not exist prior to the parties' marriage. Based on the facts and circumstances surrounding the formation of H.C., as related above, we conclude that the partnership was in existence prior to the parties' marriage in 1978.

We also note that the trial court itself found that H.C. was "initially form*ed* to acquire stock in HFSL, the corporation which purchas*ed* the Heitman Group from Cordura *prior to the marriage.*" (Emphasis added.) However, the trial court concluded by stating that, "Nevertheless, the existence of H.C. as an operating entity was not established until sometime in 1978 after the marriage." The trial court's statements in this regard are inconsistent and, we believe, irreconcilable. If, as the trial court found to be the case, H.C. acquired stock in HFSL, which in turn purchased Heitman *prior to the marriage*, H.C. clearly

had to be established and in existence as some form of operating entity to do so. Neither Kathryn nor the trial court provides any relevant authority for the proposition that H.C. was not an "operating entity" prior to the parties marriage, and we find the court's conclusion to that effect contrary to the manifest weight of the evidence.

Norman also contends that the trial court erred in concluding that his interest in individual partnership assets was marital property. In this regard, the trial court stated as follows:

> "Even were the interest in H.C. found to be nonmarital, the individual assets would still qualify for treatment as marital assets. With regard to HFSL the evidence is convincing that significant personal effort during the marriage was contributed by Mr. Perlmutter resulting in a substantial appreciation of the asset. Given the fact that the asset had a zero equity at the time of acquisition having been acquired totally with borrowed funds, the only feasible method of reimbursement is to include the total value of the asset in the marital estate. It is also significant to note that the borrowed funds were paid back during the marriage. The funds used to pay off the loan consisted of income admittedly from a nonmarital asset but attributable to the personal efforts of Mr. Perlmutter.
>
> With regard to the other assets held by H.C. Partnership, the classification of H.C. as either a marital nor nonmarital nonmarital [*sic*] is not controlling on the classification of the assets it holds. H.C. is a holding company. Each asset it holds must be analyzed separately. Having been acquired after marriage and not falling into any of the nonmarital exceptions, the following assets are marital property:
>
> a) New York Mayfair Regent

b) Chicago Mayfair Regent for which no credible value was established and which is awarded to Mr. Perlmutter

c) Slope 103 valued at $13,000.00

d) The Mayfair deal account containing $543,000.00."

First, we disagree with the trial court's finding that Norman's interest in Heitman qualifies as a marital asset. As stated earlier, the trial court initially found that H.C. Partnership was formed to acquire stock in HFSL, which in turn purchased the Heitman Group prior to the marriage. This finding seems to indicate that the trial court considered Heitman to be a nonmarital asset. The court goes on, then, to conclude that, due to Norman's "significant personal effort," the "only feasible method of reimbursement is to include the total value of the asset in the marital estate." Such a conclusion, even if valid, also would indicate that Norman's interest in Heitman is nonmarital. This is so since, if the asset was marital, there would be no need for the trial court to address the issue of reimbursement to the *marital* estate.

Section 503(c)(2) of the Act, which sets forth the guidelines for determining reimbursement, provides as follows:

"(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

* * *

(2) When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence,

> or was a gift, or, in the case of a contribution of personal effort of a spouse to non-marital property, unless the effort is significant and results in substantial appreciation of the non-marital property. Personal effort of a spouse shall be deemed a contribution by the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution." Ill. Rev. Stat. 1989, ch. 40, par. 503(c)(2).

The correct procedure to be applied under section 503(c)(2) is to determine whether either spouse, in this case Norman, contributed significant personal effort toward the nonmarital business asset which resulted in substantial appreciation of that business. (*In re Marriage of Landfield* (1991), 209 Ill. App. 3d 678, 695; *In re Marriage of Kamp* (1990), 199 Ill. App. 3d 1080, 1085.) The parties do not generally dispute either that Norman contributed significant personal effort toward Heitman or that that effort contributed to a substantial appreciation of the business. Thus, initially at least, it would seem that reimbursement to the marital estate is warranted. However, it is also true that, in valuing the right to reimbursement, if Norman's Heitman salary is found to be reasonable compensation for his efforts, the nonmarital business need not reimburse the marital estate because Norman's salary during the marriage is marital property, and, thus, the marital estate has already been compensated. (*Landfield*, 209 Ill. App. 3d at 695; *Kamp*, 199 Ill. App. 3d at 1085; *In re Marriage of Morse* (1986), 143 Ill. App. 3d 849, 855, citing Feldman & Fleck, *Taming Transmutation: A Guide to Illinois' New Rules on Property Classification & Division Upon Dissolution of Marriage*, 72 Ill. B.J. 336, 344 (1984).) In addition, the fact that Norman could have received a higher salary, as implied by Kathryn, does not mean that

he was not adequately compensated. *Landfield*, 209 Ill. App. 3d at 695.

Kathryn attempts to distinguish *Morse* and *Kamp* on the basis that in those cases the reviewing court remanded for additional evidence on the question of whether the husband's compensation from a nonmarital business was adequate compensation to the marital estate. However, Kathryn notes that Norman commonly receives in excess of $1 million in compensation, and she has never seriously suggested that Norman is undercompensated. To the contrary, Kathryn's valuation expert testified to the effect that Heitman executives, including Norman, were actually overcompensated. Based on these considerations, we conclude that Norman's Heitman salary was in fact reasonable compensation for his efforts. As such, the marital estate has also already been compensated, and the trial court's finding that the marital estate is entitled to reimbursement for the full value of Norman's interest in Heitman, based on his personal efforts, was against the manifest weight of the evidence.

In concluding that Heitman qualified as a marital asset, the trial court also found that the funds used to pay off the Heitman loan "consisted of income admittedly from a nonmarital asset but attributable to the personal efforts of [Norman]." In this regard, the trial court was apparently attempting to follow section 503(a)(8) of the Act, which states "income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse" is nonmarital property. (Ill. Rev. Stat. 1989, ch. 40, par. 503(a)(8).) However, the rule in this section has been said to be "consistent with prior decisional law which established that income in the form of *earnings from employment* received during marriage is marital property." (Em-

phasis added.) Ill. Ann. Stat., ch. 40, par. 503(a)(8), Historical & Practice Notes, at 63 (Smith-Hurd Supp. 1991), citing *In re Marriage of Fleming* (1980), 80 Ill. App. 3d 1006.

Roger Smith, the chief financial officer of Heitman, testified that, between December 31, 1978, and December 31, 1979, the Cordura note was reduced from $10 million to $336,875. In response to question from Kathryn's counsel, Smith stated that the $10 million "was primarily paid out of the [Heitman] assets which were in existence at the date that Heitman Financial Services [was] acquired." The evidence at trial allowed the trial court to conclude that the Cordura note was paid either "primarily," or at least in part, from the sale of Heitman assets and investments and not solely from Norman's income in the form of earnings from employment. Accordingly, the trial court's failure to consider these other means of repayment, and its apparent conclusion that the loan was paid off entirely from Norman's income, was contrary to the evidence.

Finally, even if some portion of the Cordura note was repaid with marital funds, "nonmarital property is not transmuted into marital property merely as the result of the use of marital funds to reduce the indebtedness." (*In re Marriage of Leisner* (1991), 219 Ill. App. 3d 752, 763; see also *In re Marriage of Crouch* (1980), 88 Ill. App. 3d 426, 430.) To the extent that the marital estate should be reimbursed for contributions made to reduce the Cordura note stemming from Norman's employment income, we leave that issue to be determined on remand.

To summarize, the trial court basically concluded that Heitman qualified as marital property for two reasons. First, it found that Norman's significant personal efforts resulted in the substantial appreciation of the asset. Sec-

ond, it found that the funds used to pay off the loan consisted entirely of income attributable to the personal efforts of Norman. We have found these conclusions to be against the manifest weight of the evidence, and, accordingly, we reverse the trial court's finding that Heitman was marital property.

We agree, however, with the trial court's finding that the other assets of H.C. Partnership, acquired after the parties' marriage, constitute marital property. The cases cited by Norman in support of his argument that the trial court erred in analyzing assets of the partnership separately are inapposite. In both *In re Marriage of Weiss* (1984), 129 Ill. App. 3d 166, and *In re Marriage of Wilson* (1982), 110 Ill. App. 3d 809, the reviewing courts were addressing the proper method of valuing a partnership. Those cases were not concerned with the classification of a partnership or its assets as marital or nonmarital property.

Similarly, in *In re Marriage of Landfield* (1991), 209 Ill. App. 3d 678, *In re Marriage of Kamp* (1990), 199 Ill. App. 3d 1080, and *In re Marriage of Wilder* (1983), 122 Ill. App. 3d 338, cited by Norman, the courts were concerned with section 503(a)(7) of the Act, which provides that an increase in the value of nonmarital property remains nonmarital property, subject to reimbursement to the marital estate. (Ill. Rev. Stat. 1989, ch. 40, par. 503(a)(7).) Those cases did not address, and the question was not at issue, whether specific assets of a partnership, acquired after the marriage, would be classified as marital or nonmarital property.

Instead, we believe the case law relied upon by Kathryn to be more closely analogous to the specific issue at hand. In *In re Marriage of Kennedy* (1981), 94 Ill. App. 3d 537,

the primary property-related issue concerned the disposition of the husband's music store business. Title to the music stores was in several corporations in which the husband held most of the stock. In classifying the business, the court held that the stores the husband owned before the marriage, including the increase in value of those stores, was the husband's nonmarital property. *Kennedy*, 94 Ill. App. 3d at 547.

After the parties were married, however, the business expanded, and the husband acquired additional stores. With regard to these stores, the court stated:

> "The stores acquired after the marriage are new and distinguishable property; we do not regard them as mere 'improvements' to the old stores (or the corporations or 'the business'). The new property is marital. It does not come under any exception to the rule that property acquired during the marriage is marital." (94 Ill. App. 3d at 548.)

The court also added, "The stores are sufficiently separable so that there is no practical necessity to treat them as a unit." 94 Ill. App. 3d at 548.

Similarly, we consider the assets acquired by H.C. after the parties' marriage to be new and distinguishable property. All of the assets are sufficiently separable and distinct from one another, and their acquisition clearly constitutes more than an "increase in value" in H.C. Therefore, these remaining H.C. assets, having been acquired after the parties' marriage, and not shown by Norman to be among the nonmarital exceptions listed in sections 503(a)(1) through (a)(6) of the Act, were properly classified by the trial court as marital property.

Norman also argues that the trial court erred in accepting Kathryn's experts' appraisal values for Heitman and

the New York Mayfair Regent Hotel. With regard to Heitman, Kathryn presented the expert testimony of Gregory Vlasak, a senior vice-president and officer of Duff & Phelps Financial Consulting Company. Vlasak concluded that the total equity value of Heitman was $50 million to $55 million. In reaching this figure, Vlasak utilized two primary methods of valuation, a discounted cash flow approach and a comparable company approach. Norman did not present any expert testimony or evidence regarding the value of Heitman.

To verify the discounted cash flow analysis, Vlasak compared Heitman to 11 other companies that provide investment advisory services. When Vlasak compared Heitman's compensation figures to those of the other publicly traded companies, he concluded that the overall figures for Heitman's top executes were higher than those for executives in the comparable companies. In an attempt to reach what Vlasak considered to be a reasonable and competitive compensation level, he then added back to Heitman's value $2 million to $3 million representing monies that in public companies would have been distributed to shareholders as dividends rather than to executives as bonuses.

Norman's attack on Vlasak's valuation is basically two-pronged. He contends that, with respect to the discounted cash flow analysis, Vlasak's upward adjustment to net income after considering Heitman compensation levels was a legally impermissible technique. He also contends that various aspects of Vlasak's comparable company analysis were improper. We conclude that the trial court was warranted in accepting Vlasak's valuation testimony for three reasons.

First, as Kathryn notes, and as Norman concedes, Norman did not present any expert testimony or evidence

of his own regarding Heitman's value. Thus, there was no counterevidence of value before the trial court. Second, Vlasak's opinion of Heitman's value, based on actual Heitman compensation, that is, excluding the compensation add-back technique, would have been $17.4 million. Since Norman readily concedes in his brief that he would accept that valuation figure, he implicitly acknowledges and accepts the validity, except for the compensation add-back technique, of Vlasak's analysis. Norman's protestations in general, therefore, as to Vlasak's discounted cash flow or comparable company methodology, appear to be without merit. Third, the one arguably relevant case Norman cites in support of his argument that the compensation add-back technique is "legally impermissible" is distinguishable from the facts of this case.

Norman cites *Fehrs v. United States* (Ct. Cl. 1980) 620 F.2d 255, for the proposition that the technique utilized by Vlasak is legally impermissible. In *Fehrs*, the court addressed what it saw as a problem involved in comparing one company with others for valuation purposes. The court's concern stemmed from the fact:

> "[T]he expert *entirely avoided* the use of the Rental's own earnings as a basis for the application of the earnings multiplier in favor of a reconstructed earnings base *derived wholly* from the profitability levels of companies other than Rental. This, as the court sees it, is an approach that proceeds not by comparison but by substitution and, in the last analysis, represents the valuation of a non-existent company." (Emphasis added.) (*Fehrs*, 620 F.2d at 265.)

In his brief, Norman only provides us with the last sentence in the above-quoted material. He therefore fails to note that, while the expert in *Fehrs* entirely avoided the company's own earnings in favor of an earnings base derived wholly from the profitability levels of other com-

panies, Vlasak did in fact consider Heitman's overall revenues, and his conclusion was based on a partial upward adjustment to net income. Since Vlasak's valuation was not derived solely from the compensation and profitability levels of the comparable companies, as was the case in *Fehrs*, we do not believe that that case compels a finding that the trial court erred in accepting Vlasak's methodology.

Regarding Heitman's valuation, the trial court stated as follows:

> "*Valuation of HFSL*
>
> I am persuaded that the discounted cash flow valuation methodology used by Gregory Vlasek [*sic*] is the appropriate method to value HFSL. He was criticized by Mr. Perlmutter for certain assumptions he made for determining the cash flow. I find, nevertheless, that he presented a convincing case for determining actual cash flow by making certain adjustments in the executive compensation structure. However, I also find, given Mr. Perlmutter's minority position in the company notwithstanding his so called veto power, that a discount rate greater than 10-15% is appropriate. I would select a 35% discount rate and by applying that to Mr. Vlasek's [*sic*] figures reach a value of approximately $4,420,000.00 for Mr. Perlmutter's interest in HFSL."

The valuation of property is a question of fact, and a trial court's determination of value will not be reversed unless it is contrary to the manifest weight of the evidence. (*In re Marriage of Wilder* (1983), 122 Ill. App. 3d 338, 349.) After taking into consideration the valuation evidence presented by Kathryn's expert, together with the fact that Norman did not present expert testimony or evidence to rebut Vlasak's methodology, we conclude that the trial court did not err in placing the value of Norman's interest in Heitman at $4,420,000.

Regarding the valuation of the New York Mayfair Regent Hotel, Norman contends that the value presented by Kathryn's expert, Christopher Kuehnle, was "legally flawed" because he used the wrong methodology, having utilized a comparable sales approach rather than an income approach based on the hotel's current business operations.

Kuehnle appraised the value of the New York hotel at $160 million. To reach this figure, he examined and analyzed sales of hotels having similar characteristics to the Mayfair Regent. Multiplying the number of rooms with this market data, Kuehnle arrived at a value of $160 million. As Kathryn correctly points out, this approach was approved in *Reynolds v. Coleman* (1988), 173 Ill. App. 3d 585, 596.

Norman's expert, Jules Marling, testified that in his opinion the New York hotel should be valued at $105 million. It is very interesting to note, however, that Marling utilized *both* a sales comparison approach, using many of the same comparable hotels as Kathryn's expert utilized in his analysis, and an income approach to arrive at this figure. It therefore seems odd, and even somewhat disingenuous, for Norman to argue now that the comparative sales methodology is "legally flawed."

We also note that Heitman's own valuation of the New York hotel, conducted in 1986 prior to the investment of $36 million in renovations, was $100 million. With this in mind, the trial court concluded as follows:

> "*Valuation of New York Mayfair Regent*
>
> Mr. Perlmutter's interest in the New York Mayfair Regent Hotel is found to be $6,350,000.00. I reject the methodology employed by Mr. Marling. It defies reason to think that after $3[6],000.00 [*sic*] in renovations an asset valued by management at $100,000,000 prior to the renovations would increase in value by less than $4,000,000.00. I accept Mr. Kuehnle's theory

> that the hotel as one of a limited number of Deluxe New York hotels carries a trophy value. As with the HFSL I would apply a 35% discount rate to reach the value of Mr. Perlmutter's minority interest."

We agree with the trial court that it would be absurd to conclude that, if, as Heitman's own valuation estimate indicates, the Hotel was worth $100 million prior to the renovation project, it would only appreciate by some $5 million after an infusion of $36 million in improvements. As it is for the trier of fact to determine conflict in the testimony of experts (*In re Marriage of Foley* (1987), 163 Ill. App. 3d 1, 9), the resolution of conflict between Kuehnle's testimony and that of Marling was within the purview of the trial court, and there was no error in placing the value of Norman's interest in the New York hotel at $6,350,000.

Norman's next contention is that the trial court erred when it found that the funds in various investment accounts were Kathryn's nonmarital property. In addressing this issue in its letter opinion, the trial court stated as follows:

> "Kathryn Perlmutter has the following items of nonmarital property which are awarded to her:
>
> a) Her investment accounts which contain funds clearly traceable to the proceeds of stock in the Finley Company which she received as a gift from her father. Certain deposits of marital funds were commingled with the nonmarital funds in the investment accounts. These deposits were transmuted to Mrs. Perlmutter's nonmarital property. Nevertheless $28,000.00 in deposits are clearly retraceable to the marital estate and reimbursement in that amount into the marital estate is warranted."

Norman concedes that the money Kathryn received in 1981 was nonmarital at the time of receipt. He maintains,

however, that marital funds were subsequently commingled with the nonmarital funds and that, since Kathryn was unable at trial to "trace" which funds were nonmarital, they were transmuted into marital property. Norman relies primarily on *In re Marriage of Landfield* (1991) 209 Ill. App. 3d 678, and *In re Marriage of Davis* (1991), 215 Ill. App. 3d 763, in support of this argument.

Kathryn argues, and we agree, that Norman confuses the respective burdens that are imposed on the parties when commingling occurs. Section 503(c)(1) of the Act, which governs the commingling of marital and nonmarital property, provides in part that, "[w]hen marital and nonmarital property are commingled by contributing one estate of property into another resulting in loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution," subject to the reimbursement provisions of section 503(c)(2). (Ill. Rev. Stat. 1989, ch. 40, par. 503(c)(1).) Section 503(c)(2) provides, however, that no reimbursement is to be made if a contribution is not retraceable by clear and convincing evidence. Ill. Rev. Stat. 1989, ch. 40, par. 503(c)(2); *In re Marriage of Guntren* (1986), 141 Ill. App. 3d 1, 6.

Thus, according to the Act, if marital funds were contributed to and commingled with Kathryn's nonmarital funds, resulting in a loss of identify of the marital funds, the classification of the marital funds was transmuted to Kathryn's nonmarital estate, subject to the reimbursement provisions of section 503(c)(2). Thereafter, in order for the marital estate to be reimbursed for any contribution made to Kathryn's nonmarital estate, it became Norman's burden to trace, by clear and convincing evidence, the nature of those contributions. Ill. Rev. Stat. 1989, ch. 40, pars. 503(c)(1), (c)(2); *Guntren*, 141 Ill. App. 3d at 6.

Here, the trial court found that $28,000 in deposits were clearly traceable to the marital estate and ordered that the marital estate was therefore entitled to reimbursement in that amount. Although Norman alleges that other marital property was commingled with Kathryn's nonmarital funds, he offers no clear and convincing evidence of such contributions. This fact distinguishes the present situation from the cases cited by Norman, where specific amounts of marital property were traceable and determined to have been contributed to and commingled with the nonmarital estate. See *In re Marriage of Davis*, 215 Ill. App. 3d at 768-69; see also *In re Marriage of Landfield*, 209 Ill. App. 3d at 694.

This is essentially the procedure the trial court followed when it determined that the funds in the investment accounts were Kathryn's nonmarital property. While the court's use of the word "traceable" as it related to the identity of the stock proceeds was unfortunate, and probably led to Norman's confusion as to which party had the burden of tracing contributions, we believe that the ultimate conclusion reached by the trial court was correct.

Next, Norman argues that the trial court's decisions regarding the division of marital property and the award of child support were improper. Specifically, Norman contends that the trial court erred when it (1) included his 1990 bonus as part of his income for child support purposes but then awarded to Kathryn the account into which the bonus had been deposited; (2) ordered him to reimburse Kathryn for her condominium rental incurred in Snowmass, Colorado, during Christmas 1988; (3) ordered him to reimburse the marital estate for certain improvements to Norman's home in Highland Park; (4) failed to consider the tax consequences of its property distribution orders; and (5) ordered him to pay $12,000 per month,

plus various other expenses, for child support of the parties' two minor children. Norman maintains that, as a result of the trial court's division of property, he will be rendered financially insolvent.

As stated above, we have already reversed some of the findings of the trial court with regard to its classification and distribution of assets. In light of that conclusion, "we do not believe that any purpose would be served by reviewing the propriety of the court's overall division of property." (*In re Marriage of Leisner* (1991), 219 Ill. App. 3d 752, 766.) In addition, since the division of marital property and the financial resources of the parents are among those factors to be considered in determining the amount of child support (Ill. Rev. Stat. 1989, ch. 40, par. 505(a)(2)), courts have stated that it is also advisable to "remand to the trial court all interrelated property and support issues once it has been determined that the property division was improper." (*In re Marriage of Wilson* (1982), 110 Ill. App. 3d 809, 815-16.) Therefore, as was the case in *Leisner* and *Wilson*, our reversal as to property classification and distribution necessarily will require the trial court to reexamine the overall division of property and the issue of child support in light of the adjusted financial resources of the parties. *Leisner*, 219 Ill. App. 3d at 766; *Wilson*, 110 Ill. App. 3d at 816.

Finally, Norman argues that he is entitled to a new trial on the ground that the trial court's rulings and conduct demonstrated extreme bias and prejudice against him, thereby denying him his right to a fair trial. Specifically, Norman contends that the following instances demonstrate the trial judge's bias and prejudice: (1) the court awarded judgment interest on $3,415,000 from September 12, 1990, although the September 12 judgment was not yet final and appealable due to the outstanding issues of attorney

fees and sanctions; (2) the court's October 10, 1990, order, requiring Norman to assume the $1 million mortgage on the Snowmass residence, had the effect of precluding Norman from obtaining *supersedeas* on that obligation; (3) that the court's conduct created uncertainty as to the appealability of the September 12 order and caused him to appeal prematurely; (4) the court required him to post an appeal bond to secure the $3,415,000 (later $2,415,000) nonfinal judgment; (5) the court failed to observe the rules of evidence or procedure at the hearing for attorney fees and sanctions; (6) the court erred in awarding sanctions; (7) the court allowed Norman only 14 days to post an additional bond of $55,000; and (8) the court failed to control improper actions and conduct by Kathryn's counsel at trial and instead praised Kathryn's counsel while criticizing Norman's counsel.

Kathryn responds, in part, to Norman's allegations of trial court prejudice by arguing that Norman has waived this issue for review by failing to raise the question of prejudice in the trial court. In this regard, Kathryn contends that, since Norman filed neither a motion for a new trial nor a motion for a change of venue alleging the trial court bias or prejudice, he cannot now raise the issue for the first time on appeal. Kathryn cites *McCormick v. McCormick* (1988), 180 Ill. App. 3d 184, and *Hollo v. Hollo* (1985), 131 Ill. App. 3d 119, in support of this position. In his reply brief, Norman maintains that all of the acts and circumstances that demonstrate the trial court's prejudice occurred after September 1990 and could not have been raised earlier and further that, pursuant to section 2-1203 of the Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, par. 2-1203), post-trial motions are not required in bench trials. Norman does not address Kathryn's argument regarding motions for change of venue.

First, we disagree with Norman's contention that all of the alleged instances of trial court bias occurred subsequent to the court's September 12, 1990, order and could not, therefore, have been raised earlier. As stated above, Norman also alleges that the trial court's prejudice and bias was evidenced by its failure, *during trial*, to control supposedly improper actions by Kathryn's counsel. Moreover, while we agree initially with Norman's statement that post-trial motions are not mandated in bench trials (Ill. Rev. Stat. 1989, ch. 110, par. 2-1203), we also note that on September 19, 1990, Norman did in fact file a motion, pursuant to section 2-1203, asking the trial court to vacate its September 12 order due to confusion concerning the finality and appealability of that order, or to reconsider certain other findings. At no point in this motion, however, did Norman allege any instance of prejudice or bias.

We also agree with Kathryn's position that, if Norman believed the trial court was prejudiced against him, he should have requested a change of venue on that basis. (See *McCormick*, 180 Ill. App. 3d at 191.) Section 2-1001 of the Code of Civil Procedure governs the procedural requirements for requesting a change of venue and provides, in part, as follows:

> "(a) A change of venue in any civil action may be had in the following situations: * * *
>
> (2) Where any party or his or her attorney fears that he or she will not receive a fair trial in the court in which the action is pending, because the inhabitants of the county are or the judge is prejudiced against him or her, or his or her attorney, or the adverse party has an undue influence over the minds of the inhabitants. In any such situation the venue shall not be changed except upon application, as provided herein, or by consent of the parties.
>
> * * *

> (c) Every application for a change of venue by a party or his or her attorney shall be by petition, setting forth the cause of the application and praying a change of venue, which petition shall be verified by the affidavit of the applicant. A petition for change of venue shall not be granted unless it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, but if any ground for such change of venue occurs thereafter, a petition for change of venue may be presented based upon such ground." Ill. Rev. Stat. 1989, ch. 110, par. 2-1001.

The right of a party to seek a change of venue on the ground of prejudice may be waived if not asserted at the appropriate time. (*McCormick*, 180 Ill. App. 3d at 192; *Hollo*, 131 Ill. App. 3d at 127-28.) Although the general rule is that a petition for change of venue is untimely if presented after the trial court has ruled on a substantive issue in the case, section 2-1001 does in fact allow for the situation where a ground for change of venue allegedly occurs after rulings have been made. (*McCormick*, 180 Ill. App. 3d at 192; Ill. Rev. Stat. 1989, ch. 110, par. 2-1001(c).) In this case, it is not disputed that Norman never requested a change of venue on the basis of trial court bias or prejudice. Accordingly, based on *McCormick* and *Hollo*, we conclude that the issue of the trial court's alleged prejudice and bias has been waived for review.

We also agree that, even if the issue of prejudice had not been waived, the trial judge's conduct did not deprive Norman of a fair trial. As stated by the court in *McCormick*:

> "It is well established that a trial judge is presumed to be impartial [citation] and relies only on proper evidence in reaching a determination on the merits. [Citation.] The burden of overcoming this presumption rests on the party making the charge of prejudice, who must present evidence of personal bias stemming

> from an extrajudicial source [citations] and evidence of prejudicial trial conduct [citation]. During a bench trial, a judge's comments are generally regarded as making explicit that which is implicit in the adverse ruling [citation], and the judge's subjective opinion as to what the evidence has demonstrated is insufficient to establish personal bias or to raise an inference of prejudice." (*McCormick*, 180 Ill. App. 3d at 194.)

Moreover, this court has held that allegations that a judge has made erroneous rulings against a party are not allegations of personal prejudice. (*Palmisano v. Connell* (1989), 179 Ill. App. 3d 1089, 1096; see also *McCormick*, 180 Ill. App. 3d at 194.) Rather, a demonstration of actual prejudice is required. *In re Marriage of Click* (1988), 169 Ill. App. 3d 48, 53.

In his brief, Norman states that the trial court "appears to have intended to sanction Norman from the outset and the September 12 judgment interest award is simply an additional sanction" and that the trial court "appeared to be focused only upon the end result of sanctioning Norman without regard to legal procedure or Norman's rights." Norman cites no authority for the proposition that this suspected prejudice on the part of the trial judge can serve as the basis for a new trial. In fact, the only case Norman cites for the proposition that he did not receive a fair trial due to prejudice is *People v. Eckert* (1990), 194 Ill. App. 3d 667. In *Eckert* the court stated that the "trial judge's remarks not only conveyed an impression *to the jury* that he felt defense counsel was not doing his job properly, but also that the defense was wasting the court's time." (Emphasis added.) (*Eckert*, 194 Ill. App. 3d at 674.) *Eckert*, concerning as it did a judge's conduct in the presence of a jury, is clearly inapposite to the facts of this case, where a bench trial was conducted. Based

on our review of the record, we cannot conclude on the basis of the trial court's comments, conduct or rulings that Norman was deprived of a fair and impartial trial.

In addition, as was the case with the division of property and child support issues, our reversal as to property classification and distribution will also require the trial court to reexamine the issue of attorney fees in light of any adjusted financial resources of the parties. (*In re Marriage of Thacker* (1989), 185 Ill. App. 3d 465, 470.) We feel similarly disposed concerning the issue of judgment interest. This is so because the trial court's award to Kathryn of $3,415,000, later reduced to $2,415,000, and judgment interest thereon, was made in order "to provide [Kathryn] with the balance of her share of marital property." Since our reversal as to the classification of certain marital property necessarily affects the total amount of such property to be distributed, reexamination of these issues is also required.

For all of the foregoing reasons, we affirm in part and reverse in part the judgment of the circuit court of Lake County and remand for further proceedings not inconsistent with the views expressed in this opinion.

Affirmed in part; reversed in part and remanded.

DUNN and UNVERZAGT, JJ., concur.

[Certificate of Clerk omitted in printing.]

(Letterhead Of)

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT

Appeal from the Circuit Court of County of Lake

Trial Court Number: 87D2204

THE COURT HAS THIS DAY, 03/19/92, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-91-0254

IRMO: Perlmutter, Kathryn & Norman

Petition for rehearings filed by both petitioner and respondent, are hereby denied.

(Bowman, Dunn, Unverzagt, JJJ.)

LOREN J. STROTZ, Clerk

cc: Mary Ellen Dienes
Roger A. White
Don H. Reuben
Sarane C. Siewerth
Donald C. Schiller
Mr. Arnold B. Stein
Timothy M. Daw
Stephen H. Katz

(Letterhead Of)

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

October 7, 1992

* * * * *

No. 73584—Kathryn Perlmutter, respondent, v. Norman Perlmutter, petitioner. Leave to appeal, Appellate Court, Second District. (2-91-0254)
Petition for leave to appeal denied.
Bilandic, J., took no part.

* * * * *

(Letterhead Of)

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

November 9, 1992

Mr. Paul P. Biebel, Jr.
Attorney at Law
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601

Dear Mr. Biebel:

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 73584—Kathryn Perlumutter, respondent, v. Norman Perlumutter, petitioner.

The motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal is DENIED.

This Court's mandate issued today to the Appellate Court, Second District, in the above entitled cause.

Bilandic, J., took no part.

JH/hc
cc: Ms. Mary Ellen Dienes
Mr. Roger A. White
Mr. Donald C. Schiller

[Filed September 12, 1990]

IN THE
CIRCUIT COURT OF 19th JUDICIAL CIRCUIT
LAKE COUNTY, WAUKEGAN, ILLINOIS

IN RE THE MARRIAGE OF:	)	
	)	
KATHRYN PERLMUTTER,	)	
	)	
Petitioner,	)	
and	)	No. 87-D-2204
	)	
NORMAN PERLMUTTER,	)	
	)	
Respondent.	)	

JUDGMENT OF DISSOLUTION OF MARRIAGE

This cause coming on to be heard for trial as a contested matter upon the duly verified Petition for Dissolution of Marriage of the Petitioner, KATHRYN PERLMUTTER and the Response of the Respondent, NORMAN PERLMUTTER; the Petitioner being present in open Court and being represented by her counsel, DONALD C. SCHILLER, ARNOLD B. STEIN, and TIMOTHY M. DAW of SCHILLER DU CANTO AND FLECK and STEPHEN H. KATZ, and the Respondent being present in open Court and being represented by his counsel, DON REUBEN of WINSTON & STRAWN, GEORGE S. FEIWELL and LAWRENCE S. STARKOPF of FEIWELL, GALPER & LASKY, LTD. and ROGER A. WHITE; the Court having heard the evidence adduced by the Petitioner and Respondent and their re-

spective witnesses and considered the exhibits admitted into evidence, and having heard argument of counsel and having reviewed the respective Proposed Findings of Fact and Conclusions of Law, and being fully advised in the premises, DOTH FIND:

1. KATHRYN PERLMUTTER is presently 41 years of age, resides at 17 East Scott Street, City of Chicago, County of Cook, and State of Illinois.

2. NORMAN PERLMUTTER is presently 56 years of age, resides at 2345 Egandale Road, the City of Highland Park, County of Lake, and State of Illinois.

3. The parties were married on the 20th day of January, 1978 at the City of Chicago, County of Cook, and State of Illinois. The marriage is registered in Cook County, Illinois.

4. The parties are presently residents of the State of Illinois, and have been such residents for a period in excess of ninety (90) days prior to the filing of this action. The jurisdictional requirements of the Illinois Marriage and Dissolution of Marriage Act have been satisfied.

5. Two (2) children were born to the parties as a result of the marriage, to-wit: HARRY PERLMUTTER, presently age 9, born July 11, 1980, and ALEXANDER PERLMUTTER, presently age 7, born November 16, 1982. No children were adopted by the parties during the course of their marriage and KATHRYN PERLMUTTER is not presently pregnant.

6. During the course of their marriage, the parties experienced irreconcilable differences. Past attempts at reconciliation have failed and future attempts would not be practicable or in the family's best interests. Said irreconcilable differences have caused an irretrievable breakdown

of the marriage. The parties have lived separate and apart for a continuous period in excess of two years, since June of 1987.

7. The parties entered into a Joint Parenting Agreement dated June 29, 1988 whereby the parties resolved between themselves issues of custody and visitation. Said Agreement was filed with the Court on June 29, 1988. On July 1, 1988, this Court entered an Order in which finding were made that the parties entered into said Agreement freely and voluntarily and that said Agreement was fair and equitable. Further, pursuant to this Order of July 1, 1988, this Court approved said Agreement and ordered that it be made part of any interim or final decree in this cause.

8. The parties have continued to operate under the terms of the Joint Parenting Agreement and the children have resided with the respective parties as provided in the Agreement.

9. Considering the Petitioner's income from investments, which will increase once the division of marital provided for in this Judgment is carried out, and the Respondent's expected continued generosity in directly providing for his children, it is appropriate to set a support figure which deviates from the Section 505 guidelines. Notwithstanding Respondent's income of over $1,000,000 a year, a reasonable amount for child support for the two minor children under the circumstances of this cause would be Twelve Thousand Dollars ($12,000) per month in addition to Respondent's other direct obligations for the children as set forth in the Order of this Court of August 16, 1988 (excluding his paying child care expenses while the children are in Petitioner's home).

10. The Petitioner's accounts at:

a. Continental Illinois National Bank Account Numbers: 85-28233; 83-50655; 00-09852548; 00-11004516; 00-11004591; 00-10765025; and 00-11004559.

b. Northern Trust Company Account Number: 8172277.

c. NBD Highland Park Account Number: 648183.

d. Columbia National Bank of Chicago Account Numbers: 74-0173-00-0; 53-677-2; and 995-504-6.

e. Otero Savings Account Number: 13-24006276.

f. Bank Plus Account Number: 46-940409.

g. San Antonio Savings Certificate of Deposit.

h. Gilford Securities Account Number: 406-02792.

i. Dreyfus Account Number: 2-40001355-3.

j. Smith Barney Account Number: 016-647675.

with an aggregate total of Two Million Three Hundred Nine Thousand Seven Hundred Ninety Nine Dollars ($2,309,799) at the time of trial are found to be Petitioner's non-marital property as proceeds of stock in the Finley Company which was gifted to Petitioner by her father. Deposits of marital funds were subsequently commingled with these non-marital funds and were transmuted to Petitioner's non-marital property, of which Twenty Eight Thousand Dollars ($28,000) were clearly traced into these non-marital funds, and reimbursement to the marital estate is warranted.

11. The residence at 458 Sumac, Highland Park, Illinois, and legally described on Exhibit "A", is Petitioner's non-marital property, traceable to the Petitioner's non-marital investment accounts.

12. Petitioner's jewelry is her non-marital property, having overcome the presumption of marital property and proving they were gifts from the Respondent.

13. The improved realty at 2345 Egandale Avenue, Highland Park, Illinois, and legally described on Exhibit "B", is Respondent's non-marital property with a fair market value of Two Million Eight Hundred Thousand Dollars ($2,800,000).

14. The Petitioner has shown by clear and convincing evidence that the Respondent expended One Million Six Hundred Thirty Three Thousand Five Hundred Sixty Nine Dollars ($1,633,569) of marital funds for improvements to his non-marital home located at 2345 Egandale Avenue, Highland Park, Illinois, and those funds are reimbursable to the marital estate.

15. The following interests or accounts are found to be the non-marital property of the Respondent, NORMAN PERLMUTTER:

a. The WAU Account containing Four Hundred Seventy Five Thousand Dollars ($475,000) in Treasury bills.

b. The Sikes Account with a balance of Five Hundred Fifteen Thousand Dollars ($515,000), subject to reimbursement to the marital estate of Four Hundred Twenty Seven Thousand Dollars ($427,000) of Central Plaza Funds deposited into this account.

c. Sike Center Partnership interest valued at One Hundred Thirty One Thousand Dollars ($131,000).

d. LaSalle Lake Investors Partnership valued at Thirty Three Thousand Dollars ($33,000).

e. The two Ferrari automobiles valued at Three Hundred Twenty Five Thousand Dollars ($325,000).

f. Certain artwork in the Egandale residence valued at Forty Nine Thousand Five Hundred Dollars ($49,500).

g. Chris Craft stock standing in the Respondent's name valued at Two Hundred Fifty One Thousand Seven Hundred Seventy Dollars ($251,770).

16. The Four Hundred Twenty Seven Thousand Dollars ($427,000) that the Respondent received in October of 1989 as a result of the sale of real estate owned by the Central Plaza Partnership was marital money and was clearly shown to have been deposited into the Respondent's non-marital Sikes Account. The marital estate is entitled to reimbursement for that sum.

17. The improved realty located at 28 Forest Lane, Snowmass, Colorado is marital property and has a fair market value of Two Million Two Hundred Thousand Dollars ($2,200,000) and is subject to a mortgage of One Million Dollars ($1,000,000) for a net equity of One Million Two Hundred Thousand Dollars ($1,200,000). The legal description of said property is attached hereto and made a part of this Judgment as Exhibit "C".

18. The improved realty at 17 East Scott, Chicago, Illinois, is marital property and has a fair market value of One Million One Hundred Fifty Thousand Dollars ($1,150,000) and is subject to a note signed by the Petitioner to the Respondent in the amount of Nine Hundred Eleven Thousand Dollars ($911,000) which is a marital debt. The legal description of said property is attached and made a part of this Judgment as Exhibit "D."

19. The 2,000 shares of UTV stock with a value at the time of trial of Seventy Thousand Dollars ($70,000) are marital property.

20. The condominium apartment on Sheridan Road in Chicago, Illinois titled in Respondent's name is marital property and there was no evidence that it had value.

21. The Respondent has in his possession marital property consisting of artwork acquired after marriage valued at Forty Four Thousand Eight Hundred Fifty Dollars ($44,850) comprised of the following: a Jamison, a Mason, a Passainse, and a Ruiz.

22. The Petitioner has artwork in her possession acquired during the marriage which is marital property valued at Sixty Five Thousand Dollars ($65,000) and consists of a Ritman painting.

23. The Respondent has title to a 1976 Corvette, a Plymouth van, and a Dodge mini-van which are marital property but for which there was no evidence of fair market values.

24. The Respondent owns an interest in a sailboat which is marital property and for which there was no evidence of fair market value.

25. There is a debt due the Respondent from B. Perlmutter in the amount of Thirty Five Thousand Dollars ($35,000) which is marital property.

26. Respondent's investment account at the Continental Illinois National Bank known as Account No. 83-37829 is a marital account. Non-marital funds that may have been deposited into that account were transmuted to marital property. Reimbursement to Respondent's non-marital estate is warranted for Fifty One Thousand Four Hundred Dollars ($51,400) because there was proof clearly tracing a Fifty One Thousand Four Hundred Dollar ($51,400) inheritance received by Respondent from his mother to that account, and that sum would be reimbursable to the Respondent's non-marital property.

27. HC Partnership is a holding company, and each asset it holds must be analyzed separately to determine if Petitioner's interests in it are marital or non-marital property.

28. Respondent's interest in HC Partnership and its assets are marital. Respondent did not meet his burden of proving that he had a non-marital interest in HC Partnership or its assets. The evidence showed HC Partnership was not an operating entity until some time in 1978 after the marriage. Even if Respondent's interests in HC Partnership were non-marital, his interests in the individual assets of HC Partnership would still be marital property. His interest in Heitman Financial, Ltd. (formerly known as Heitman Financial Services, Ltd.) is marital. The asset had a zero equity at the time of acquisition. This asset was acquired totally with borrowed funds. That borrowing was paid off during the marriage from income from a non-marital asset attributable to the personal efforts of the Respondent. As a result of significant personal effort on the Respondent's part and the borrowed funds repaid during the marriage, the asset increased substantially in value and requires a reimbursement to the marital estate of the total value of the asset.

29. The value of Respondent's interest in Heitman Financial, Ltd. (formerly Heitman Financial Services, Ltd.) is Four Million Four Hundred Twenty Thousand Dollars ($4,420,000).

30. The following having been acquired after marriage through HC Partnership and not falling into any of the non-marital property exceptions are deemed to be marital property:

a. Respondent's interest in the New York Mayfair Regent Hotel, which the Court finds to have a value

of Six Million Three Hundred Fifty Thousand Dollars ($6,350,000).

b. Respondent's interest in the Chicago Mayfair Regent Hotel, for which there was no credible evidence of a present net market value.

c. Respondent's interest in Slope 103 valued at Thirteen Thousand Dollars ($13,000).

d. The Mayfair Deal Account containing a balance at the time of trial of Five Hundred Forty Three Thousand Dollars ($543,000) which derived from refinancing of the New York Mayfair Regent Hotel.

31. The Court does not believe it appropriate to include within the valuation of HC Partnership the various bank accounts held by the individual entities in which HC Partnership has an interest, and those accounts are not included in the marital estate.

32. The payment in 1986 of One Million Seven Hundred Twenty Six Thousand Five Hundred Thirty Four Dollars ($1,726,534) from marital accounts for the 1985 joint U.S. and State of Illinois tax liabilities of the parties was not a dissipation of assets nor does it entitle the marital estate to be reimbursed from the Respondent's non-marital assets.

33. The Respondent dissipated marital assets, and he is required to reimburse the marital estate for the following:

a. Four Hundred Thirty Five Thousand Dollars ($435,000) for divorce related legal fees.

b. Four Hundred Eighty Three Thousand Dollars ($483,000) of credit card spending.

c. Eighty Four Thousand Dollars ($84,000) for spending on Roberta Goodrich and Tria Hermson. (This amount would have been higher except Respondent

used non-marital funds to pay part of this type of expense, including the use of the reimbursed funds discussed in Finding 26).

d. One Hundred Twenty Five Thousand One Hundred Ninety Three Dollars ($125,193) of relatives' support.

34. Respondent's spending in 1987 through 1989 under the categories of "Travel and Entertainment," "Miscellaneous Expenses," "Heitman Reimbursement," and other expenses, although not explained in detail, were consistent with spending practices during the marriage and are found not to be dissipation.

35. During the marriage, the parties shared an oppulent lifestyle and accumulated a multi-million dollar marital estate.

36. The Respondent is 56-years of age, in good health, a successful businessman who is the key man in Heitman Financial, Ltd. and it is reasonable to expect that he will continue to earn for several years to come annual income well in excess of One Million Dollars ($1,000,000) and has opportunities to acquire substantial assets.

37. The Petitioner is 41-years of age, in good health, with an irregular earning history. She is capable of earning income but not motivated to do so and it is highly unlikely that she will ever earn the income to match the Respondent's or she will have the comparable opportunity to acquire assets. It is desirable that Petitioner have flexibility to be available for the children.

38. Petitioner's non-marital estate provides her with a comfortable income but not sufficient to support her to the standard of living enjoyed during the marriage; however, upon receipt of her share of marital assets, she will

be in a position to meet her reasonable needs in the manner consistent with the standards enjoyed during the marriage.

39. The Petitioner contributed to the marriage her services as a mother, homemaker, and corporate wife, and she participated in charitable and civic affairs in keeping with her role as a wife of a wealthy man. She was an intelligent and effective partner in the marriage; however, she did not play an active role in the acquisition, preservation and appreciation of the parties' marital estate.

40. There is no Ante-Nuptial Agreement between the parties.

41. Considering all of the factors of Section 503 of the Illinois Marriage and Dissolution of Marriage Act, the Court feels that a division of forty percent (40%) to Petitioner and sixty percent (60%) to Respondent of the foregoing marital property would be equitable in this cause.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED:

A. The parties are awarded a Judgment of Dissolution of Marriage and the bonds of marriage heretofore existing between the Petitioner, KATHRYN PERLMUTTER, and the Respondent, NORMAN PERLMUTTER, be, and the same are hereby dissolved.

B. The parties shall carry out the provisions of the Joint Parenting Agreement dated June 29, 1988 and approved by this Court on July 1, 1988, and that said Agreement, in accordance with its terms, is made a part of this judgment.

C. The Respondent shall pay unto the Petitioner the sum of Twelve Thousand Dollars ($12,000.00) per month,

payable on the first day of September, 1990 and on the first day of each month thereafter, until further Order of Court, as and for child support of the two (2) minor children of the parties, namely: HARRY, born July 11, 1980, and ALEXANDER, born November 16, 1982. In addition, the Respondent shall pay on behalf of the children the children's private school expenses, all medical and related expenses, plus camps.

D. The Respondent is barred from maintenance, and the Petitioner's property award hereinafter provided is in lieu of any rights or claims she may have to future maintenance.

E. The Respondent is awarded all non-marital property found to be his in the Findings portion of this Judgment of Dissolution of Marriage.

F. The Petitioner is awarded all non-marital property found to be hers in the Findings portion of this Judgment of Dissolution of Marriage.

G. The Petitioner is awarded as her share of the marital property the following assets more fully described in the findings contained in this Judgment for Dissolution of Marriage:

1. The Snowmass home, subject to the $987,000 mortgage due the Continental Illinois National Bank. This mortgage shall be Petitioner's obligation and she shall indemnify and hold Respondent harmless for said note.

2. The Scott Street home and a forgiveness from the Nine Hundred Eleven Thousand Dollar ($911,000) note.

3. The Mid Town Bank Account No. 1059653 with a cash balance and U.S. Treasury securities held by the bank and/or its agent, the American National

Bank, in safekeeping for NORMAN PERLMUTTER purchased through the account which, at the time of trial, totaled Five Hundred Sixty Thousand Sixty Dollars ($560,060) and Respondent shall guarantee that sum remains on deposit for transfer to Petitioner.

4. The Mid Town Bank Account No. 1015845 with a cash balance and U.S. Treasury securities held by the bank and/or its agent, the American National Bank, in safekeeping for NORMAN PERMUTTER purchased through the account which, at the time of trial, totaled One Hundred Seventy Five Thousand Two Hundred Thirteen Dollars ($175,213) and Respondent shall guarantee that sum remains on deposit for transfer to Petitioner.

5. The Mayfair Investment Account No. 82-05442 located at the Continental Bank with a cash balance and U.S. Treasury securities held by the bank on behalf of NORMAN PERLMUTTER purchased through the account which, at the time of trial, totaled Five Hundred Forty Three Thousand Dollars ($543,000) and Respondent shall guarantee that sum remains on deposit for transfer to Petitioner.

6. Marital artwork already in Petitioner's possession.

7. Forgiveness of Petitioner's obligation to reimburse Twenty Eight Thousand Dollars ($28,000) to the marital estate.

8. The Jaguar automobile and any other vehicles she owns or possesses.

9. Petitioner shall receive from Respondent the sum of Three Million Four Hundred Fifteen Thousand Dollars ($3,415,000) plus interest from the date of this Judgment at the rate of nine percent (9%) per annum until paid.

H. The Respondent is awarded as his share of the marital property, the following assets more fully described

in the Findings contained in this Judgment for Dissolution of Marriage:

1. His interest in Slope 103.

2. 2,000 shares of UTV stock.

3. Marital artwork in Respondent's possession.

4. Loan due from B. Perlmutter.

5. His interest in Heitman Financial, Ltd.

6. His interest in Mayfair Regent Hotel in New York.

7. His interest in the remaining assets of HC Partnership.

8. Forgiveness of his obligation to reimburse the marital estate with One Million One Hundred Twenty Seven Thousand One Hundred Ninety Three Dollars ($1,127,193) for dissipation.

9. Forgiveness of his obligation to reimburse the marital estate for Four Hundred Twenty Seven Thousand Dollars ($427,000) of Central Plaza proceeds that Respondent placed in his non-marital Sikes Account.

10. Forgiveness of his obligation to reimburse the marital estate for One Million Six Hundred Thirty Three Thousand Five Hundred Ninety Six Dollars ($1,633,596) for improvements to Respondent's non-marital home on Egandale in Highland Park, Illinois.

11. The Sheridan Road condominium.

12. His interest in a sailboat; and he shall pay and be solely responsible for the debt to purchase the boat and the Sheridan Road condominium of One Hundred Sixty Five Thousand Dollars ($165,000) due to the Mid Town Bank.

13. The 1976 Corvette, the Plymouth van, and the Dodge mini-van, and any other vehicles he presently possesses.

14. The Respondent shall pay unto the Petitioner the sum of Three Million Four Hundred Fifteen Thousand Dollars ($3,415,000) plus interest at the rate of nine percent (9%) per annum from the date of this Judgment until paid, which is the sum provided in Paragraph G(9) of this Judgment to provide the Petitioner with the balance of her share of marital property. Judgment is hereby entered thereon.

I. The Respondent's right of reimbursement from the marital estate of Fifty One Thousand Four Hundred Dollars ($51,400) set forth in Finding 26 has been satisfied in computing spending of marital funds by the Respondent on Roberta Goodrich, which reduced the dissipation Respondent owed the marital estate to Eighty Four Thousand Dollars ($84,000) provided in Finding #33c. The dissipation set forth in Paragraph H(7) gives credit for that reimbursement and no further payment is required.

J. The Respondent will pay the accounting firm of Checkers, Simon & Rosner the Five Thousand Two Hundred Dollars ($5,200) they are claiming due from the Petitioner, and he shall indemnify and hold her harmless from said debt.

K. The Petitioner shall be solely liable for her debt to Columbia National Bank.

L. The Respondent shall pay to the Petitioner the sum of Eight Thousand One Hundred Dollars ($8,100) for his failure to fund an interest-free loan of Thirty Thousand Dollars ($30,000.00) from June 12, 1987 to June 12, 1990, with additional interest thereafter accruing thereon at the rate of nine percent (9%) per annum until paid and judgment is hereby entered hereon.

M. The Respondent shall pay unto the Petitioner the sum of Nine Thousand Four Hundred Fifty Dollars ($9,450) to reimburse her for rent incurred in Snowmass during

Christmas of 1988 and pursuant to an earlier Order of Court entered in this cause in October of 1988, and judgment is hereby entered thereon.

N. The Respondent shall reimburse the Petitioner for federal and state income taxes she has and will hereafter be required to pay by virtue of inclusion of, as taxable income, the temporary maintenance that she has received since the order of August 16, 1988. There have been 23 payments of $10,000.00 each that have been taxable to Petitioner through the payment in August, 1990. At a thirty percent (30%) blended tax rate for U.S. and Illinois taxes, Petitioner is entitled to receive from Respondent Sixty Nine Thousand Dollars ($69,000) in tax reimbursements, and judgment against Respondent and in favor of Petitioner is hereby entered thereon.

O. The temporary restraining order entered by this Court on February 28, 1990 is dissolved.

P. Except as is provided otherwise herein, each party is barred from all rights and claims against the other party and his or her agents, attorneys and servants, for all rights of maintenance, alimony, inheritance, descent and distribution, homestead, dower, community interest and all other right, title, claim, interest and estate as husband and wife, widow or widower, whether existing by reason of the marital relation between said parties hereto pursuant to any present or future law, or otherwise including any and all right, title, claim or interest which he or she otherwise has or might have or be entitled to claim in, to or against the property, assets and estate of the other, whether real, personal or mixed, whether marital or non-marital, whether community or separate, whether now owned or hereafter in any manner acquired by the other party, whether in possession or in expectancy and whether vested or contingent.

Q. Each of the parties shall make, execute, acknowledge and deliver, good and sufficient instruments necessary or proper to vest the titles and estates in the respective parties hereto, and from time to time, to make, execute, acknowledge and deliver any and all documents which may be necessary or proper to carry out the purposes of this Judgment and to establish of record the sole and separate ownership of the several properties of said parties in the manner herein provided. If either party hereto for any reason shall fail or refuse to execute any such documents, then this Judgment shall, and it is hereby expressly declared to, constitute a full and present transfer, assignment and conveyance of all rights hereinabove designated to be transferred, assigned and conveyed and a full, present and effective relinquishment of all rights hereinabove designated to be relinquished. In the event after thirty (30) days from the date of this Judgment, there are necessary documents which either party has failed to execute or deliver, a Judicial Officer of the 19th Judicial Circuit of Lake County, Illinois shall be authorized to make, execute and deliver any and all necessary documents on behalf of either party.

R. This Court expressly retains jurisdiction of this cause for the purpose of enforcing all the terms of this Judgment of Dissolution of Marriage.

S. Both parties are given leave of Court to file Petitions for Attorneys' Fees pursuant to Section 508 of the Illinois Marriage and Dissolution of Marriage Act within twenty-eight (28) days.

ENTER:

/s/ JANE D. WALLER
JUDGE

APPROVED AS TO FORM ONLY:

Attorney for Petitioner	Attorney for Respondent

SCHILLER, DU CANTO AND FLECK
Attorneys for Petitioner
200 North LaSalle Street, Suite 2700
Chicago, Illinois 60601
(312) 641-5560

EXHIBIT "A"

Legal Description

458 Sumac
Highland Park

Lot 81 in George F. Nixon and Company's Woodridge Subdivision of part of the South half of the North East quarter of Section 34, Township 43 North, Range 12, East of the Third Principal Meridian, according to the Plat thereof, recorded March 18, 1927, as Document 295816, in Book "R" of Plats, pages 32 and 33, in Lake County, Illinois.

EXHIBIT "B"

Legal Description

2345 Egandale Avenue
Highland Park, Illinois

PARCEL 1: That part of Lot 3 in Block 31 in the City of Highland Park, described as follows: Commencing at the Southwest corner of said Lot; thence Northerly along the Westerly line of said Lot, 100 feet; thence Easterly on a line parallel with the Southerly line of said Lot to water's edge of Lake Michigan; thence Southerly along said water's edge to a point where the Southerly line of said Lot intersects said water's edge; thence Westerly along the Southerly line of said Lot to the place of beginning.

PARCEL 2: That part of Lot 3 in Block 31 in the City of Highland Park, described as follows: Beginning at a point on the Westerly line of said Lot, 100 feet Northerly from the Southwest corner of said Lot; running thence Easterly upon a line parallel to the Southerly line of said Lot to the water's edge of Lake Michigan; thence Northerly along the water's edge of Lake Michigan to a point 100 feet Southerly from and at right angles to the Northerly line of said Lot (and said Northerly line extended Easterly); thence Westerly on a line parallel with and 100 feet Southerly from the Northerly line of said Lot to the Westerly line of said Lot; thence Southerly along the Westerly line of said Lot to the place of beginning.

PARCEL 3: The Easterly 46 feet of that portion of Ravine Place (vacated by Ordinance of the City of Highland Park passed and approved February 2, 1923 and recorded February 8, 1923, as Document 220522), lying West of and adjoining the Southerly 87 feet 4-7/8 inches of the Northerly 187 feet 4-7/8 inches of Lot 3, Block 31 measured at right angles to the Northerly line of Lot 3 in the City of Highland Park.

EXHIBIT "C"

Legal Description

28 Forest Lane
Snowmass, Colorado

Lot #37, Wood Run I, Snowmass Village, Colorado, according to the plat filed for record with the Pitkin County Clerk and Recorder, Pitkin County, Colorado.

EXHIBIT "D"

Legal Description

17 East Scott
Chicago, Illinois

Lot 1 in Gregory Vigeant's Subdivision of Lot 5 in Block 10 in H. O. Stone's Subdivision of Astor's Addition to Chicago in Section 3, Township 39 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois.

[Filed October 10, 1990]

IN THE
CIRCUIT COURT OF 19th JUDICIAL CIRCUIT
LAKE COUNTY, WAUKEGAN, ILLINOIS

IN RE THE MARRIAGE OF:	)	
	)	
KATHRYN PERLMUTTER,	)	
	)	
Petitioner,	)	
and	)	No. 87-D-2204
	)	
NORMAN PERLMUTTER,	)	
	)	
Respondent.	)	

ORDER

This cause coming on for hearing on Count II of the Petition for Rehearing filed by Respondent, NORMAN PERLMUTTER, and the Motion to Reconsider Pursuant to Section 2-1203 of the Illinois Code of Civil Procedure filed by Petitioner, KATHRYN PERLMUTTER; the Court having heard argument of counsel and being fully advised in the premises;

IT IS HEREBY ORDERED:

1. That the Judgment of Dissolution of Marriage is hereby amended to add the following finding of fact:

> "There are two (2) accounts at the Mid Town Bank in the name of the Respondent, NORMAN PERLMUTTER, which were opened during the marriage and contain assets accumulated during the marriage. Said accounts are as follows:

(a) Account No. 1059653 with a balance at the time of trial of cash and securities of Five Hundred Sixty Thousand Sixty Dollars ($560,060).

(b) Account No. 1015845 with a balance at the time of trial of cash and securities of One Hundred Seven Five Thousand Two Hundred Thirteen Dollars ($175,213).

2. Respondent's Petition for Rehearing, Count II being the remaining item for adjudication is denied.

3. Respondent's Motion to Strike Petitioner's Motion for Reconsideration etc. is denied.

4. The Petitioner's Motion to Reconsider filed Oct. 4, 1990 is granted only as to the following which is in paragraph 9 of the Motion. The Judgment is hereby amended as follows:

a) As to paragraph G1 of the Judgment, Respondent, Norman Perlmutter, shall pay and be solely liable for the Note and Mortgage encumbering the Snowmass home and he shall hold Petitioner harmless thereon. Petitioner is not obligated to pay the Note and Mortgage.

b) As to paragraph G9 and H14, the $3,415,000 due Petitioner from Respondent is reduced to $2,415,000.00 and the Judgment is reduced accordingly.

In all other respects the Motion is denied.

ENTER:

/s/ JANE D. WALLER
JUDGE

Schiller, Du Canto & Fleck
Attys. for Petitioner
200 N. LaSalle
Chicago
312-609-5517

[Filed February 28, 1991]

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

IN RE: THE MARRIAGE OF KATHRYN PERLMUTTER, Petitioner, and NORMAN PERLMUTTER, Respondent.	)	No. 87-D-2204

ORDER

This Cause coming on to be heard on the Petition of KATHRYN for attorney's fees; the response and affirmative defenses of NORMAN; the Court having heard evidence and arguments of counsel and pursuant to a letter of opinion filed by the Court on February 21, 1991, incorporated herein as Exhibit "A". Said findings include but are not limited to the following:

A. That NORMAN shall reimburse KATHRYN for the following amounts for the defense of the entire Petition for the change of venue;

a. $10,300.00 to Ronald Ladden;

b. $13,700.00 to Patrick Kronenwetter;

c. $7,000.00 to Stephen Katz.

B. That NORMAN shall reimburse KATHRYN for the proceedings regarding the psychiatric care for the children in the following amounts:

a. $450.00 to Arnold Stein;

b. $1,875.00 to Timothy Daw;

c. $2,900.00 to Donald Schiller.

C. NORMAN shall reimburse KATHRYN for attorney's fees for the abuse of discovery pursuant to Supreme Court Rule 219 per the letter of opinion of February 21, 1991 in the following amounts:

a. $27,000.00 to Arnold Stein;

b. $12,500.00 to Timothy Daw;

c. $3,000.00 to Donald Schiller.

D. NORMAN shall reimburse KATHRYN for work related to the Snowmass residence and the rental of a substitute accommodation for services performed by Stephen Katz. Fees in the amount of $2,225.00 shall be paid by NORMAN to Stephen Katz.

E. NORMAN is entitled to a credit in the amount of $45,000.00 for fees advanced on KATHRYN's behalf to Ronald Ladden and Patrick Kronenwetter.

F. That with the entry of this Order the Court has resolved all outstanding issues between the parties concerning their marital rights.

IT IS HEREBY ORDERED:

Judgment is entered in favor of Stephen Katz, Esq. and Schiller, DuCanto & Fleck, Ltd., and against NORMAN PERLMUTTER in the amount of $35,950. Execution is stayed thereon for 14 days.

ENTER:

/s/ JANE D. WALLER
JUDGE

Dated this ____ day of February, 1991,
at Waukegan, Illinois

PREPARED BY:
ROGER A. WHITE & ASSOCIATES, LTD.
21 North Skokie Highway
Lake Bluff, IL 60044
(708) 234-6680

[Filed October 26, 1988]

STATE OF ILLINOIS
COUNTY OF LAKE—SS

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

IN RE: THE MARRIAGE OF:	)	
	)	
KATHRYN PERLMUTTER and	)	GENERAL NO.
	)	87 D 2204
NORMAN PERLMUTTER	)	

ORDER

This cause coming on to be heard on the Petition of the Plaintiff, Kathryn Perlmutter, seeking sanctions under Section 2-611 of the Illinois Code of Civil Procedure, and on the Response thereto filed by the Defendant, Norman Perlmutter, and the Court having heard the testimony adduced in these proceedings, and having considered the arguments of counsel and being fully advised in the premises;

FINDS AS FOLLOWS:

1. That the Defendant filed a Motion to Transfer Venue of this cause from Lake County, Illinois to Cook County, Illinois.

2. That the Motion to Transfer Venue was predicated on two theories:

(a) That a contract existed between the parties to conduct their litigation in Cook County, Illinois;

(b) The Lake County forum was inconvenient and under the doctrine of Forum Non Conveniens, the appropriate forum was Cook County, Illinois.

3. That Section 2-611 of the Illinois Code of Civil Procedure requires that an inquiry be conducted as to whether a factual basis exists to support the pleading.

4. The evidence adduced in open Court was insufficient to prove that an oral agreement existed between the parties to litigate in Cook County, Illinois; and, that lack of evidence could have been determined if a reasonable inquiry had been made in advance by counsel for the Defendant.

5. That the written contract between the parties concerning the $910,000.00 did not constitute any type of contract to litigate in Cook County; that fact could also have been ascertained by Defendant's counsel if a reasonable inquiry had been conducted by them.

6. That the failure to conduct a reasonable inquiry on the contract theory resulted in unnecessary litigation which delayed these proceedings; consequently, sanctions are warranted.

7. That Section 2-611 of the Illinois Code of Civil Procedure provides appropriate sanctions, which may include an Order to pay the other party's reasonable expenses, including a reasonable attorney's fee for violation of that Section. The Court finds that payment of reasonable attorney's fees would be an appropriate sanction in this cause.

IT IS THEREFORE ORDERED AS FOLLOWS:

A. That, within fourteen days within entry of this Order, counsel for Plaintiff shall file Affidavits setting

forth the time expended by them in connection with Defendant's Motion to Transfer Venue to Cook County, Illinois.

B. That a hearing to determine the reasonable fee to be paid by the Defendant for violation of Section 2-611 of the Illinois Code of Civil Procedure be and is hereby set for status 1/17/89.

ENTER:

/s/ JANE D. WALLER
JUDGE

DATED at Waukegan, Illinois
this ____ day of _____, 1988

[Filed July 27, 1990]

(Letterhead Of)

Circuit Court of Illinois
19th Judicial Circuit
Waukegan, Illinois 60085

July 26, 1990

Donald C. Schiller
Arnold B. Stein
Timothy M. Daw
Schiller, DuCanto
and Fleck
200 N. LaSalle Street
Chicago, IL 60601

Stephen H. Katz
325 Washington Street
Waukegan, IL 60085

George Feiwell
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35 N. Wacker Drive
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Roger White
21 N. Skokie Highway
Lake Bluff, IL 60044

Re: In re the Marriage of Perlmutter
87 D 2204

Gentlemen:

I make the following findings:

Jurisdiction, venue and *grounds*

The material allegations with regard to jurisdiction, venue and grounds have been established.

Custody

The parties have joint custody of their two minor children, Harry, age 10, and Alexander, age 7, pursuant to a joint parenting agreement approved by the Court on

July 1, 1988. The joint parenting agreement establishes that both parents enjoy blocks of time with the children. The children reside primarily with Mrs. Perlmutter during the school year.

Child Support

Mr. Perlmutter has a substantial income well in excess of one million dollars per year from earnings and investments. Historically he has provided generously for the needs of the children not only through payments to Mrs. Perlmutter but also by direct payments on behalf of the children for education, medical care, entertainment, child care and travel expenses. The children have enjoyed all the advantages that a wealthy and indulgent father can provide. Mrs. Perlmutter's earned income (actual and potential) is insignificant in comparison to Mr. Perlmutter's. She does have income from investments which can be expected to increase once the division of marital property becomes effective. She also has used her resources to provide a very comfortable lifestyle for the family. Considering that Mrs. Perlmutter will have a sizeable personal estate of her own once the division of property becomes effective and that Mr. Perlmutter will undoubtedly continue to freely bestow his bounty upon his children, it is appropriate to set a support figure which deviates from the §505 guidelines. Nevertheless, Mr. Perlmutter has an obligation to contribute to the children's support while they are in the care of Mrs. Perlmutter in order to balance the advantages available to the children in both households. Mr. Perlmutter will be ordered to pay child supoort to Mrs. Perlmutter in the amount of $12,000.00 per month. He will continue to be responsible for the pay directs as set forth in the order of August 16, 1988 except that Mrs. Perlmutter shall be responsible for the expense of child care while the children are residing in her home.

Classification of property

Kathryn Perlmutter has the following items of nonmarital property which are awarded to her:

a) Her investment accounts which contain funds clearly traceable to the proceeds of stock in the Finley Company which she received as a gift from her father. Certain deposits of marital funds were commingled with the nonmarital funds in the investment accounts. These deposits were transmuted into Mrs. Perlmutter's nonmarital property. Nevertheless $28,000.00 in deposits are clearly retraceable to the marital estate and reimbursement in that amount into the marital estate is warranted.

b) The Sumac residence which was acquired during marriage but by funds clearly traceable to the nonmarital investment accounts.

c) Her jewelry.

Norman Perlmutter has the following items of nonmarital property which are awarded to him:

a) The Egandale home which was acquired by Mr. Perlmutter prior to the marriage. As befits his position and achievements in life Mr. Perlmutter lives in a fabulous home in Highland Park overlooking Lake Michigan. He has spent incredible sums of money in order to create an environment for himself which reflects his taste and style. The house contains the finest in materials and craftsmanship. It is tastefully decorated and carefully maintained. Its size, location, quality, condition, amenities and special features place it at the top of the market in Highland Park. The location of several rooms below grade is an essential element in the design of the home and can hardly be said to detract from the value. In valuing the home consideration must be given to market resistance to homes

in the upper bracket. However, given the uniqueness of the Perlmutter home the value of $2,800,000.00 ascribed to it by Mr. King is accepted by the Court.

During the marriage, as previously noted, Mr. Perlmutter made substantial improvements to the Egandale residence. From 1987 to 1989 he expended $995,569.29 from marital funds which he concedes must be reimbursed to the marital estate.

In addition, Mr. Perlmutter expended substantial funds out of his investment account (which is hereinafter found to be marital) during the years 1982, 1984, 1985 and 1986 in order to make major repairs and to remodel the house. These expenditures total $638,000 and must be reimbursed to the marital estate. The fact that the expenditures were made with Mrs. Perlmutter's consent is not a defense to the obligation to reimburse.

Other undisputed items of nonmarital property of Mr. Perlmutter which are awarded to him are:

a)	Wau account	475,000.00	
b)	Sikes Account	515,000.00	(less $427,000 in Central Plaza funds)
c)	Sikes Partnership	131,000.00	
d)	LaSalle Lake Investment	33,000.00	
e)	The Ferrari automobiles	325,000.00	
f)	Certain artwork in the Egandale residence	49,500.00	
g)	Chris Craft Stock	251,770.00	

The parties have the following undisputed items of marital property:

a) Snowmass home which has a net equity of 1.2 million dollars. The value ascribed to it by petitioner's expert is credible and accepted by the court.

b) Scott Street home which has a value of $1,150,000.00 subject to a note signed by Mrs. Perlmutter to Mr. Perlmutter in the amount of $911,000.

c) 2000 shares of UTV stock valued by petitioner at $35.00 per share as of May 25, 1990 for a total value of $70,000.00.

d) Sheridan Road Condo for which no value was offered and which will be awarded to Mr. Perlmutter.

e) Artwork in Mr. Perlmutter's possession acquired after the marriage valued at $44,850.00.

f) Artwork in Mrs. Perlmutter's possession acquired after the marriage valued at $65,000.00.

g) The 1976 Corvette, the Plymouth Van and the Dodge Mini Van for which fair market values were not offered. The parties are awarded the vehicles they now possess.

h) Mr. Perlmutter's interest in a sailboat for which no value was offered and which will be awarded to Mr. Perlmutter.

i) Mr. Perlmutter's loan to B. Perlmutter in the amount of $35,000.00.

The Continental Investment Account

The Continental Investment account is a marital account. It was opened during the marriage with borrowed funds. Mr. Perlmutter has not met his burden of proving that the account was acquired with nonmarital funds. Some nonmarital funds may have been deposited into this account which would have resulted in those funds being commingled and transmuted to marital funds. The amount and source of the nonmarital deposits cannot be clearly retraced and therefore reimbursement is not warranted

except for the $51,400 inheritance Mr. Perlmutter received from his mother initially deposited in the investment account and then transferred to the so called inheritance account. Although the inheritance account, having been opened during the marriage with marital funds, is technically a marital asset, the entire balance being attributable to a nonmarital source must be reimbursed to the nonmarital estate of Mr. Perlmutter.

H.C. Partnership

H.C. Partnership is an investment partnership. It was initially formed to acquire stock in HFSL, the corporation which purchased the Heitman Group from Cordura prior to the marriage. A stock certificate representing shares of stock issued by HFSL in November, 1979 to H.C. and a copy of a partially executed H.C. partnership agreement were produced by Mr. Perlmutter in support of his position that H.C. was a partnership in which he obtained an interest prior to the marriage. Nevertheless, the existence of H.C. as an operating entity was not established until sometime in 1978 after the marriage. Mr. Perlmutter has not met his burden of proving that he has a nonmarital interest in H.C. and its assets.

Even were the interest in H.C. found to be nonmarital, the individual assets would still qualify for treatment as marital assets. With regard to HFSL the evidence is convincing that significant personal effort during the marriage was contributed by Mr. Perlmutter resulting in a substantial appreciation of the asset. Given the fact that the asset had a zero equity at the time of acquisition having been acquired totally with borrowed funds, the only feasible method of reimbursement is to include the total value of the asset in the marital estate. It is also significant to note that the borrowed funds were paid back during the marriage. The funds used to pay off the loan consisted

of income admittedly from a nonmarital asset but attributable to the personal efforts of Mr. Perlmutter.

With regard to the other assets held by H.C. Partnership, the classification of H.C. as either a marital or nonmarital nonmarital [sic] is not controlling on the classification of the assets it holds. H.C. is a holding company. Each asset it holds must be analyzed separately. Having been acquired after marriage and not falling into any of the nonmarital exceptions, the following assets are marital property:

a) New York Mayfair Regent
b) Chicago Mayfair Regent for which no credible value was established and which is awarded to Mr. Perlmutter
c) Slope 103 valued at $13,000.00
d) The Mayfair deal account containing $543,000.00.

The proceeds of the Central Plaza partnership are also deemed to be marital property. The proceeds were deposited into the nonmarital Sikes deal account and are clearly retraceable. Reimbursement to the marital estate in the amount of $427,000 is warranted.

Valuation of HFSL

I am persuaded that the discounted cash flow valuation methodology used by Gregory Vlasek is the appropriate method to value HFSL. He was criticized by Mr. Perlmutter for certain assumptions he made for determining the cash flow. I find, nevertheless, that he presented a convincing case for determining actual cash flow by making certain adjustments in the executive compensation structure. However, I also find, given Mr. Perlmutter's minority position in the company notwithstanding his so called veto power, that a discount rate greater than 10-15% is appropriate. I would select a 35% discount rate and by applying that to Mr. Vlasek's figures reach a value of ap-

proximately $4,420,000.00 for Mr. Perlmutter's interest in HFSL.

Valuation of New York Mayfair Regent

Mr. Perlmutter's interest in the New York Mayfair Regent Hotel is found to be $6,350,000.00. I reject the methodology employed by Mr. Marling. It defies reason to think that after $36,000.00 in renovations an asset valued by management at $100,000,000 prior to the renovations would increase in value by less than $4,000,000.00. I accept Mr. Kuehnle's theory that the hotel as one of a limited number of Deluxe New York hotels carries a trophy value. As with the HFSL I would apply a 35% discount rate to reach the value of Mr. Perlmutter's minority interest.

Partnership Accounts

I reject the contention advanced by Mrs. Perlmutter that the various accounts held by the individual entities of H.C. Partnership should be included in the marital estate. Including individual bank accounts would ignore the overall value of each entity.

Taxes

In 1986 the sum of $1,726,534.00 was paid out of marital accounts towards the 1985 joint state and federal tax liability of the parties. The tax liability was attributable to the liquidation of a nonmarital asset of Mr. Perlmutter. The payment does not consist of dissipation having occurred prior to the breakdown of the marriage. Nor does the payment warrant reimbursement to the marital estate. It cannot be said to be a contribution to the nonmarital estate of Mr. Perlmutter having been a payment in satisfaction of a *joint* tax liability.

Dissipation

It is conceded by Mr. Perlmutter that he paid legal fees in the amount of $435,000 from marital funds. He will be required to reimburse the marital estate for that amount.

Mrs. Perlmutter also claims dissipation in the form of unbridled spending during the period of estrangement at a level far in excess of the already high level of spending enjoyed during the marriage. In order to quantify the dissipation she compares the amount spent in years before the separation with the amount spent in the years after the separation making adjustments for certain expenditures otherwise accounted for and for certain differences in living arrangements and accounting methods. The difficulty with this approach is that it risks comparing apples to oranges. While I would reject the comparison method as a measure of dissipation, it is clear that spending increased after the separation and that purposes not related to family expenses were supported. Mr. Perlmutter has the burden of explaining the use of the funds claimed to be dissipated. With regard to several categories of expenses he has failed to meet his burden of proof.

1. He failed to adequately explain the money he admits to have spent on credit cards in the amount of $483,000.00.

2. He admits to spending over $155,000.00 on behalf of Roberta Goodrich and Tria Hermson, clearly a nonmarital purpose. However, of the $155,000.00 spproximately $71,000.00 is traceable to nonmarital accounts. The balance in the amount of $84,000.00 is deemed to be dissipation.

3. He admits spending $125,193.00 for relative support and financial aid which is deemed to have been for purposes not related to family expenses.

Mrs. Perlmutter also argues that Mr. Perlmutter failed to explain his spending in the categories of travel and

entertainment, miscellaneous expenses, Heitman reimbursement and other expenses. Although these categories were not explained with detail, I find that they are consistent with the spending practices during the marriage and will not be treated as dissipation.

Other 503 Factors

The parties were married in January of 1978. They lived together until June, 1987, at which time they separated due to irreconcilable differences. During the marriage they shared an opulent lifestyle and accumulated a multimillion dollar marital estate.

Mr. Perlmutter is 55 years old and in good health. He is an exceedingly astute and successful businessman. He has amassed a substantial estate not merely as a result of his efforts during the marriage but also as a result of his lifelong career in the business. He is the key man in the enterprise known as Heitman Financial Ltd. having worked his way up from an entry level position. Given his position, power, talents and resources it is reasonable to expect that he will continue to earn for several years to come an annual income well in excess of one million dollars and to have the opportunity to acquire substantial assets.

Mrs. Perlmutter is 41 years old and in good health. She is bright, capable and attractive. Her earning history is somewhat desultory. Although she is clearly capable of earning income, she is not particularly motivated. It is desirable that she have the flexibility to be available for the children. It is highly unlikely that she will ever have an earned income to match Mr. Perlmutter's or a comparable opportunity to acquire assets. She does have a comfortable income from her nonmarital estate, not sufficient however to support her to the standard of living

enjoyed during the marriage. Nevertheless, upon being given her share of the marital estate she will be in a position to meet her reasonable needs in a manner consistent with the standards enjoyed during the marriage.

Mrs. Perlmutter contributed to the marriage her services as a mother, homemaker, and corporate wife. She participated in charitable and civic affairs in keeping with her role as the wife of a wealthy man. She was an intelligent and effective partner in the marriage. It cannot be said, however, that she played an active role in the acquisition, preservation, and appreciation of the marital estate.

There is, unfortunately, no antenuptial agreement between the parties.

Maintenance

The division of marital property will be in lieu of Mrs. Perlmutter's claim to maintenance. Mr. Perlmutter is barred from maintenance.

Miscellaneous Issues

1. By an agreement dated June 12, 1987, Mr. Perlmutter agreed to make an interest free loan to Mrs. Perlmutter to cover expenses incurred by Mrs. Perlmutter in setting up the household on Scott Street. He failed to make the loan and Mrs. Perlmutter is entitled to interest on the unpaid amount at the rate of 9%.

2. Mr. Perlmutter owes to Mrs. Perlmutter the sum of $9,450.00 which she incurred to rent a residence in Snowmass for a week at Christmas in 1988. The evidence supports a finding that it was not possible for Mrs. Perlmutter to rent a suitable residence for only a one week period and that her only option was to negotiate a two week lease.

3. The temporary maintenance order of August 16, 1988 reserved the issue of whether additional funds should be paid to Mrs. Perlmutter to compensate her for the income taxes on her temporary maintenance. Given by Mr. Perlmutter's superior income, it is reasonable to require that he reimburse her for taxes she incurred.

4. The temporary restraining order is dissolved.

Division of Assets

The balance of the marital property will be divided 60% to Mr. Perlmutter and 40% to Mrs. Perlmutter as follows:

Assets	Values	Mr. Perlmutter	Mrs. Perlmutter
Scott St.	1,150,000.00		1,150,000.00
Snowmass	1,120,000.00		1,120,000.00
Slope 103	13,000.00	13,000.00	
UTV stock	70,000.00	70,000.00	
Midtown Acct.	175,213.00		175,213.00
Midtown Acct.	560,060.00		560,060.00
Mayfair Acct.	543,000.00		543,000.00
Artwork	44,000.00	44,000.00	
Artwork	65,000.00		65,000.00
B.Perlmutter loan	35,000.00	35,000.00	
HSFL	4,420,000.00	4,420,000.00	
NY Hotel	6,350,000.00	6,350,000.00	
Dissipation	1,114,000.00	1,114,000.00	
Reimbursement from Mrs. Perlmutter's investment accounts	28,000.00		28,000.00
Reimbursement from the Sikes Acct.	427,000.00	427,000.00	
Reimbursement from Egandale	1,525,555.00	1,525,555.00	
Totals	17,639,828.00	13,998,555.00	3,641,273.00

In order to achieve a 40% division of the assets to Mrs. Perlmutter, Mr. Perlmutter is ordered to pay to her the sum of $3,415,000.00 plus interest at 9%. Mrs. Perlmutter will be responsible for the mortgage on the Snowmass residence and the loan from Columbia National Bank. Mr. Perlmutter will pay the bill from Checkers Simon.

Counsel for Mrs. Perlmutter are directed to prepare a judgment containing the provisions set forth in this letter. The case will be scheduled for status as to entry of judgment on August 20, 1990 at 11:00 A.M.

Very truly yours,

/s/ JANE D. WALLER
Associate Judge

JDW/cs

[Filed October 12, 1988]

(*Letterhead Of*)

Circuit Court of Illinois
19th Judicial Circuit
Waukegan, Illinois 60085

October 11, 1988

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Waukegan, Illinois 60085

Ronald Ladden
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Patrick Kronenwetter
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Chicago, Illinois 60610

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30 North LaSalle St., Suite 2400
Chicago, Illinois 60602

Roger A. White
21 North Skokie Highway
Lake Bluff, Illinois 60044

Re: In re the Marriage of Perlmutter
87 D 2204

Gentlemen:

Mrs. Perlmutter requests 2-611 sanctions against Mr. Perlmutter for his motion to change venue. Section 2-611 requires a determination of whether the pleading is supported by a reasonable inquiry into its factual and legal basis and also an analysis of the purpose for filing the pleading.

The motion advances two legal theories upon which the change is sought. Mr. Perlmutter argues in the alternative that Lake County is an inconvenient forum and that the parties agreed to litigate in Cook County. The forum non-convenience theory is clearly warranted by existing law. The legal basis for the contract theory is in dispute. However because of my findings with regard to the factual basis of the contract theory, it is not necessary to resolve the legal argument.

The critical issue is therefore whether a reasonable inquiry was made into the factual basis for the motion. The evidence adduced at the hearing was woefully insufficient to support a finding that the parties through their attorneys had orally agreed to litigate in Cook County. There was no evidence to support the theory that the written agreement between the parties regarding the $910,000 bound Mrs. Perlmutter to litigate in Cook County. I find that Mr. Perlmutter has failed to demonstrate a reasonable inquiry as to the factual basis for the contract theory.

With regard to the theory based on forum non-convenience, there is no question that it would be more convenient for Mr. Perlmutter and most of the attorneys to litigate the case in Cook County. The issue is whether the facts are sufficient to raise the convenience factor to meet the legal standard of forum non-convenience. This is a close question and I do not find a failure to make the proper inquiry on this issue.

Section 2-611 also requires an analysis of the purpose for the filing of the pleading. Despite the existence of an objectively proper purpose, e.g. the selection of a more convenient form, Section 2-611 permits the inference of an improper purpose where there is a failure of proper inquiry and a resulting delay in litigation. Although the

necessary inquiry was conducted on the forum non-convenience theory, it was not conducted on the contract theory. The result was a costly delay in the litigation. A substantial amount of time in discovery and trial was devoted to the contract issue impeding the progress of the case. 2-611 sanctions are warranted.

Counsel for Mrs. Perlmutter is directed to prepare an order in conformity with this letter. The matter is continued for entry of the order to October 14, 1988.

Very truly yours,

/s/ JANE D. WALLER
Associate Judge

JDW/slh

[Filed February 21, 1991]

(Letterhead Of)

Circuit Court of Illinois
19th Judicial Circuit
Waukegan, Illinois 60085

February 21, 1991

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SCHILLER, DU CANTO
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RE: The Marriage of Perlmutter
Case No. 87 D 2204

Dear Counsel:

The dissolution of the marriage of Mr. & Mrs. Perlmutter has been a long ordeal for the parties and a burden on the court system. The case started with a petition for change of venue which was an indication of what was to come, litigation marked by tactics designed to confuse, deplete, and distract. The hearing on the petition consumed several days of trial, caused the parties to incur thousands of dollars in attorneys' fees and ended in an emergency motion by Mr. Perlmutter to dismiss the petition. There has been a previous finding that the petition

violated § 2-611 in that an inadequate investigation was made as to the factual basis for the allegation that an agreement to litigate in Cook County existed between the parties. The subsequent course of the litigation reveals the frivolous nature of the alternate basis for the petition. Mr. Perlmutter alleged that to litigate in Lake County would cause undue disruption in his business affairs. To the contrary, once the petition for change of venue was dismissed, counsel were able to agree to procedures which accommodated the conveniences of the parties and their counsel. I conclude that the petition for change of venue was a tactic employed to exert economic coercion on Mrs. Perlmutter. Mr. Perlmutter is ordered to bear the expense incurred by Mrs. Perlmutter in defending the entire petition.

Mrs. Perlmutter agreed to pay attorney Ronald Ladden a discounted fee which included approximately $10,300.00 in fees attributable to the petition for change of venue. She agreed to pay attorney Patrick Kronnewetter a discounted fee which included approximately $13,700.00 in fees attributable to the petition for change of venue. I find these fees to be fair and reasonable based on the petition and the affidavits of Ladden and Kronnewetter. In addition, Mrs. Perlmutter incurred a fee for services rendered by Stephen Katz in connection with the petition for change of venue. He is found to have expended close to 40 hours. A reasonable fee for his services is $7,000.00.

The Perlmutter case was highly litigated. Mercifully the parties were able to avoid a custody trial, but even that issue required court attention when Mr. Perlmutter sought to by-pass the joint parenting agreement on the issue of psychiatric care for the children. Certainly, the emotional health of the children deserved whatever attention was required. Indeed the parties in their joint

parenting agreement had agreed to a method for addressing just such needs. Nevertheless, Mr. Perlmutter initiated court action to resolve the issue without first attempting to employ the dispute resolution provision in the joint parenting agreement. Mr. Stein spent 2.4 hours in response to the court action. Mr. Schiller spent over 14.5 hours and Mr. Daw spent over 15 hours in response to the petition. The amount of time spent on this matter was considerable, but given the emotional nature of the issue, the importance of the issue to the parties, and the risk it posed to the custody arrangement, the time is found to be reasonable. Fees are assessed against Mr. Perlmutter for the services of Mr. Stein in the amount of $450.00, for the services of Mr. Daw in the amount of $1,875.00, and for the services of Mr. Schiller in the amount of $2,900.00.

Mrs. Perlmutter also requests an assessment of fees against Mr. Perlmutter for discovery abuses. Mr. Perlmutter controlled the access to much of the highly complex information needed by counsel for Mrs. Perlmutter in order to prepare for trial. The challenge of discovery was to secure disclosure of the information without creating undue annoyance, expense, embarrassment, advantage, or oppression. To that end the court undertook to supervise discovery in order to facilitate the process. Nevertheless, the course of discovery was difficult. I do not fault counsel for Mrs. Perlmutter. Their preparation was thorough and aggressive but not abusive. Counsel for Mr. Perlmutter on the other hand, employed tactics which have to be viewed as designed to delay and obstruct Mrs. Perlmutter's preparation for trial. I find the following conduct to be abusive of discovery pursuant to Supreme Court Rule 219 warranting sanctions in the form of an assessment of fees against Mr. Perlmutter:

1. The late, incomplete, and confusing responses to the 220 interrogatories.
2. The debacle of the Doherty deposition.
3. The failure to furnish documents previously made available to Mr. Perlmutter's experts, such as the Gold report and the records reviewed by Mr. Doherty.
4. The failure to produce a current report from Randy Gold until the morning of his testimony.
5. The failure to reveal information about the lawsuit affecting the New York hotel and about the Snowmass development.
6. The identification of Mr. Appel as an expert on a spurious tax issue.
7. The failure to produce certain documents and witnesses without a motion to compel.

The discovery abuses required substantial fees to be incurred by Mrs. Perlmutter. Mr. Stein spent in excess of 150 hours, Mr. Daw spent in excess of 100 hours and Mr. Schiller spent in excess of 15 hours. For discovery abuses, fees are assessed against Mr. Perlmutter for Mr. Stein's services in the amount of $27,000.00, for the services of Mr. Daw in the amount of $12,500.00, and for the services of Mr. Schiller in the amount of $3,000.00.

Mrs. Perlmutter also requests an award of fees for certain work performed by Stephen Katz for work on discovery issues and for work relating to the use of the Snowmass house and the rental of a substitute accommodation for Mrs. Perlmutter. The evidence does not establish that the work performed by Mr. Katz on the discovery issues related to discovery violations and no fees will be awarded. With regard to the dispute over the use of the house and the failure to pay the rent for the substitute accommodations, I find Mr. Perlmutter's position to be arbitrary and

unreasonable. Fees in the amount of $2,225.00 for 12.3 hours of services by Mr. Katz are assessed against Mr. Perlmutter.

The attorneys for Mrs. Perlmutter were faced with a formidable challenge in the preparation of her case. They demonstrated a high degree of skill and professionalism in their representation of Mrs. Perlmutter. The hourly rates approved for their services are at the high end of fees customarily charged in Lake County. The history of the case, the complexity of the task, and the evidence of time spent support the fees awarded.

Counsel for Mrs. Perlmutter are requested to prepare an order reflecting my decision for entry on March 4, 1991.

Very truly yours,

/s/ JANE D. WALLER
Associate Judge

JDW/aj

[Filed November 25, 1987]

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

IN RE: THE MARRIAGE OF	)	
	)	
KATHRYN PERLMUTTER,	)	
	)	
Petitioner,	)	
and	)	No. 87-D-2204
	)	
NORMAN PERLMUTTER,	)	
	)	
Respondent.	)	

SUPPLEMENTAL AMENDED MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER TO COOK COUNTY

Now comes NORMAN PERLMUTTER ("NORMAN") by and through his attorneys, FEIWELL, GALPER & LASKY, LTD., ROGER A. WHITE & ASSOCIATES and ISHAM, LINCOLN & BEALE, and in support of his Motion to Dismiss pursuant to Chapter 11, §2-619(3), or, in the alternative to transfer to Cook County, pursuant to Chapter 110, §2-104 and Chapter 110A, §187, states as follows:

COUNT I

1. On the 29th day of January, 1987, NORMAN and KATHRYN PERLMUTTER ("KATHRYN") were residing in NORMAN's residence located at Highland Park, Illinois.

2. On the 29th day of January, 1987, a praecipe for divorce was filed in Cook County by Schiller, DuCanto & Fleck, Ltd., on behalf of KATHRYN as Case No. 87 D 01799. On the 5th day of March, 1987, a Petition for Dissolution of Marriage by and between NORMAN and KATHRYN was filed in Cook County, Illinois, as Case No. 87 D 01799. Venue at that time was exclusively in Lake County.

3. The action was instituted in Cook County because of an agreement between counsel for NORMAN and KATHRYN. KATHRYN desired to live in Cook County as she now does and NORMAN's business, his business records, his accountant, and his personal records are all located in Cook County. Accordingly, it was expressly agreed that the action would be instituted in Cook County and that KATHRYN and the children would move to Cook County and that NORMAN would facilitate that move to Cook County by advancing funds during the pendency of the move to Cook County. NORMAN would never have advanced funds to KATHRYN but for the agreement to litigate in Cook County and that KATHRYN to legally do so (and for her personal reasons) had to and would move to Cook County.

4. KATHRYN was clearly not bound by the agreement of the parties to maintain the divorce action, however, it was implicit in the agreement that if KATHRYN abandoned the action in Cook County, her obligation to repay the loan to her by NORMAN would forthwith accelerate and become due. She could not change or void the agreement as to Cook County and keep the funds loaned to her to permit venue in Cook County.

5. Based on the agreement, NORMAN in fact loaned to KATHRYN on May 12, 1987, the sum of $93,000 and, again, on June 12, 1987, the sum of $818,159.92, for a total

of $911,159.92. (A copy of the Notes are attached hereto as Exhibits "A" and "B" respectively.) Thereafter, KATHRYN purchased a house at 17 East Scott Street, Chicago, Illinois. In June of 1987, KATHRYN with the two children born to the marriage moved to the Scott Street home in Cook County, Illinois. The children were in fact enrolled in private schools in Chicago, Illinois, the tuition for which NORMAN paid. Also, NORMAN agreed to pay the salaries for two nannies to be employed at the Scott Street residence to provide care for the two minor children. In addition thereto, NORMAN agreed to pay a substantial amount of money each month for the maintenance and support of KATHRYN and the two minor children. The parties at that time likwise entered into a visitation agreement.

6. KATHRYN since the consummation of the agreement alleged above has changed counsel. On the 21st day of October, 1987, KATHRYN by her new counsel filed a motion to voluntarily non-suit the case then pending in Cook County which she had caused to be filed. At the time that counsel for KATHRYN moved to non-suit the case, she also filed through her new counsel this action in Lake County.

7. KATHRYN now maintains in this cause that said loan of $911,159.92 was in fact a gift, made while divorce proceedings were pending between the parties. Her claim and actions are in total violation of the agreement between the parties. KATHRYN should not be permitted to violate her agreement, keep the proceeds of said loan which is now invested in brick and mortar in Cook County and now claim a gift of $911,159.92. She either must institute proceedings in Cook County or return forthwith $911,159.92 to NORMAN.

8. This Court should enforce agreements made through counsel for parties concerning place of suit as KATHRYN has breached that agreement.

COUNT II

1. - 8. NORMAN adopts and realleges Paragraphs 1 through 8 of Count I as and for Paragraphs 1 through 8 of this Count II, as though the same were fully set forth and stated herein.

9. On or about January 22, 1987, KATHRYN PERLMUTTER ("KATHRYN"), filed a Petition for Dissolution of Marriage in Cook County, Illinois, entitled *In Re The Marriage of Kathryn and Norman Perlmutter*, Case No. 87 D 1779.

10. The Cook County Petition remained pending until October 23, 1987, when KATHRYN was granted leave to voluntarily dismiss her cause of action.

11. Immediately after the order of dismissal was entered, NORMAN filed a new dissolution proceeding in Cook County, entitled *In Re The Marriage of Norman and Kathryn Perlmutter*, Case No. 87 D 20331.

12. Subsequent to NORMAN filing his Petition for Dissolution of Marriage, it was discovered that *prior* to dismissing her own action in Cook County, KATHRYN, on October 21, 1987, filed an action for dissolution in Lake County, entitled, *In Re The Marriage of Kathryn and Norman Perlmutter*, Case No. 87 D 2204.

13. Chapter 110, §2-619(3) provides that a defendant may file a motion for dismissal or for other appropriate relief if there is another action pending between the parties for the same cause. Based on the facts presented, KATHRYN had a prior pending action in Cook County

at the time she filed her Lake County Petition for Dissolution of Marriage, i.e., the same cause, that would have been the subject of a Motion to Dismiss if NORMAN would have had knowledge of the existence of the Petition for Dissolution filed in Lake County. KATHRYN not only is and was attempting to circumvent the intent of Section 2-619(3), as well as NORMAN, to attempt to divest the Circuit Court of Cook County of jurisdiction in this case. See the Affidavits of Peer Pedersen and Marc D. Janser attached hereto as Exhibits "C" and "D" respectively. Therefore, the Court should dismiss KATHRYN's pending action in Lake County based on the fact that at the time of filing in Lake County, she had a prior pending action in Cook County for the identical cause, i.e., dissolution of marriage.

COUNT III

1. - 8. NORMAN readopts and realleges Paragraphs 1 through 8 of Count I as and for Paragraphs 1 through 8 of this Count III, as though the same were fully set forth and stated herein.

9. - 13. NORMAN readopts and realleges Paragraphs 9 through 13 of Count II as and for Paragraphs 9 through 13 of this Count III, as though the same were fully set forth and stated herein.

14. KATHRYN's conduct in attempting to have this matter litigated in Lake County is a shallow attempt at "forum shopping". Pursuant to Chapter 110, §2-104 and Chapter 110A, §187, this matter should be transferred to Cook County, based upon the following:

A. At the time KATHRYN filed her Petition for Dissolution of Marriage in Lake County, she was a resident of Cook County. In fact, she had negotiated a

$910,000.00 loan with NORMAN for the purchase of a home located at 17 Scott Street in Chicago, Illinois—which loan was to be repaid at the conclusion of the Cook County proceeding;

B. NORMAN and KATHRYN entered into a Joint Parenting Agreement pursuant to the Cook County action, which provided that the children physically reside with KATHRYN in Chicago. As custody is an issue in this cause, all evidence to be elicited regarding the children is located in Cook County, to wit:

(i) The children reside in Cook County;

(ii) The minor child, Harry, attends the Latin School in Chicago, and the minor child, Alexander, attends school at City Day in Chicago. Thus, teachers, counselors and school records are all in Cook County;

(iii) The children have two (2) nannies who reside with them at the home in Chicago;

(iv) The children attend religious training at Am Shalom Synagogue located in Glencoe, Illinois. Thus, all teachers and records pertaining to the children's religious education are located in Cook County;

C. All of NORMAN's investments and persons having knowledge of said investments are located in Cook County, Illinois;

D. NORMAN's principal place of business is located at 180 North LaSalle Street, Chicago, Illinois;

E. All of NORMAN's voluminous business records are located at 180 North LaSalle Street, Chicago, Illinois;

F. That NORMAN's accountants and technical persons who have knowledge of NORMAN's affairs have their principal place of business in the City of Chicago.

In fact, except for the residence in which NORMAN resides, there are no assets, records or persons who have

knowledge pertaining to this case that reside in or have easy access to Lake County, Illinois.

15. Although Chapter 40, §104 of the Illinois Marriage and Dissolution of Marriage Act allows a Petition for Dissolution of Marriage to be filed in the County in which plaintiff or defendant reside, it is clear from the facts that the county having the greatest and most convenient access to adjudicate the outstanding issues is Cook County. Therefore, this cause should be transferred to Cook County, *instanter*.

COUNT IV

1. - 8. NORMAN readopts and realleges Paragraphs 1 through 8 of Count I as and for Paragraphs 1 through 8 of this Count IV, as though the same were fully set forth and stated herein.

9. - 13. NORMAN readopts and realleges Paragraphs 9 through 13 of Count II as and for Paragraphs 9 through 13 of this Count IV, as though the same were fully set forth and stated herein.

14. - 15. NORMAN adopts and realleges Paragraphs 14 through 15 of Count III as and for Paragraphs 14 through 15 of this Count IV, as though the same were fully set forth and stated herein.

16. In furtherance of the fact that KATHRYN is forum shopping and perpetrating a fraud on Lake and Cook Counties, the Court should further be aware of the following:

A. On October 23, 1987, the date KATHRYN voluntarily dismissed her Petition for Dissolution of Marriage, there was an unresolved fee petition of Schiller, DuCanto & Fleck, KATHRYN's former attorneys.

B. KATHRYN failed to give notice to Schiller, Du Canto & Fleck for October 23, 1987, of her Motion to Dismiss.

C. On October 29, 1987, Schiller, DuCanto & Fleck presented a petition to the Court requesting adjudication of their outstanding attorneys' fees. At the same time, NORMAN filed a Motion to Vacate the order of October 23, 1987, based on KATHRYN's failure to notice Schiller, DuCanto & Fleck of her Motion to Dismiss and, therefore, the dismissal was improper. Further, KATHRYN's failure to notice Schiller, Du Canto & Fleck was an attempt to defraud them of their right to seek fees and defraud the Court into granting her Motion to Dismiss.

D. On October 29, 1987, prior to the Motion of Schiller, DuCanto & Fleck being heard, KATHRYN agreed to pay their outstanding fees, which she believed, in effect, mooted the issue of payment of their fees. However, if KATHRYN had any intention of paying Schiller, DuCanto & Fleck's fees, she would have done so without them having to file a fee petition. It is transparent on its face that the only reason KATHRYN settled the issue of her attorneys' fees was to avoid having the Court vacate the order of October 23, 1987, which would have then reinstated her case, allowing NORMAN to file his Answer and Counter-Petition, which would then keep this matter in the jurisdiction of Cook County.

17. Therefore, until the order of October 29, 1987 was entered and made nunc pro tunc to October 23, 1987, KATHRYN had a prior pending Petition in Cook County, which would have subjected her Lake County action, had notice been given of dismissal. Again, since NORMAN filed his action first in time after the entry of the October 23, 1987 order, there is a valid pending Petition for Dissolution of Marriage in Cook County, which should be the proper venue for adjudication of this cause.

WHEREFORE, NORMAN PERLMUTTER prays the Honorable Court as follows:

A. To dismiss the action now pending in Lake County, or, in the alternative, to transfer this cause to Cook County, or enter judgment in favor of NORMAN PERLMUTTER and against KATHRYN PERLMUTTER for the sum of $911,159.92;

B. For such further and other relief as the Court deems just in the premises.

By: /s/ ROGER A. WHITE
One of the attorneys for
NORMAN PERLMUTTER

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in COUNT I of this Supplemental Amended Motion to Dismiss or, in the Alternative, to Transfer to Cook County are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

PEER PEDERSEN

FEIWELL, GALPER
& LASKY, LTD.
Firm I.D. #03614
30 North LaSalle Street
Suite 2400

Don Reuben, Esq.
ISHAM, LINCOLN & BEALE
Three First National Plaza
Chicago, Illinois 60602

ROGER WHITE & ASSOC.
21 N. Skokie Highway
Lake Bluff, IL 60044

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT,
DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF	)	
	)	
KATHRYN PERLMUTTER,	)	
	)	
Petitioner,	)	
and	)	No. 87-D-1779
	)	
NORMAN PERLMUTTER,	)	
	)	
Respondent.	)	

AFFIDAVIT

Peer Pedersen, being first duly sworn on oath, states and deposes as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am the principal partner in the law firm of Pedersen & Houpt, P.C. I am one of the attorneys representing Respondent Norman Perlmutter in this cause. I have personal knowledge of the facts set forth in this Affidavit and if called to testify as a witness in this cause could testify competently with personal knowledge to the facts set forth herein.

2. I have received and reviewed Kathryn Perlmutter's Motion for Voluntary Dismissal. I consider this Motion to be a blatant attempt to forum shop and a bad faith effort to defraud Mr. Perlmutter of $910,000 loaned by him to Kathryn Perlmutter. The facts and circumstances

that lead me to these conclusions are more fully set forth below.

3. On Wednesday, October 14, 1987, at 9:30 A.M., Marc D. Janser, one of my partners, and I appeared in front of Judge Herman Knell in Courtroom 1603 representing Mr. Norman Perlmutter. Present on behalf of Kathryn Perlmutter was her attorney, Ronald Ladden from the law firm of Epton, Muller & Druth, Ltd.

4. Shortly after the Court had ruled and the Court Order was entered, Janser, Ladden and I met in the hallway outside the Court to discuss the case. During this discussion Ladden repeated several times his earnest desire to move the case away from Judge Knell. I specifically recall Mr. Ladden stating that "he wasn't going to do business in front of this Judge" and that the first thing he intended to do was to "move out of this courtroom." Neither Janser nor myself made any response to these statements by Ladden.

5. At 4:00 P.M. on the same day, Mr. Ladden along with Michael Silverman, another attorney on behalf of Kathryn Perlmutter, came to my office to meet with me and further discuss the case. Present during this meeting were Silverman, Ladden, Janser and myself. During this meeting, Mr. Ladden made numerous additional statements that indicated he intended to change venue. I specifically recall Mr. Ladden stating that he was "going to get it out of Herman Knell's courtroom."

6. Based upon the foregoing statements made by Mr. Ladden I have no doubt that the Motion for Voluntary Dismissal filed by Mr. Ladden on behalf of Kathryn Perlmutter is an attempt to change venue without filing a change of venue motion. I consider this to be blatant attempt to forum shopping and an effort to indirectly change venue after he can no longer do so directly.

7. I also consider the Motion for Voluntary Dismissal to be a bad faith effort to defraud Mr. Perlmutter out of $910,000 loaned by him to Kathryn Perlmutter pursuant to an agreement made by the parties.

8. On May 11, 1987, the parties entered into an agreement whereby Norman would loan Kathryn $910,000 for the purchase of a residence and furnishings and Kathryn would agree to repay this loan in full at the time of an entry of a Judgment of Dissolution of Marriage. A copy of this agreement is attached hereto as Exhibit A.

9. Pursuant to this agreement Kathryn agreed to sign notes evidencing her indebtedness and her promise to repay the loan in full at the time of an entry of a Judgment for Dissolution of Marriage. Said loan did not bear interest.

10. Kathryn Perlmutter's Motion for Voluntary Dismissal is a bad faith effort to delay this lawsuit, delay the date for entry of a Judgment for Dissolution of Marriage, and to thereby delay or avoid repayment to Norman Perlmutter of the loan proceeds. I consider this to be a bad faith effort to avoid payment to Norman Perlmutter and thereby defraud him.

11. Further Affiant sayeth not.

/s/ PEER PEDERSEN

SUBSCRIBED AND SWORN TO
before me this 27th day
of October, 1987.

/s/ MARY LOU BABBS
Notary Public

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT,
DOMESTIC RELATIONS DIVISION

IN RE THE MARRIAGE OF	)	
	)	
KATHRYN PERLMUTTER,	)	
	)	
Petitioner,	)	
and	)	No. 87-D-1779
	)	
NORMAN PERLMUTTER,	)	
	)	
Respondent.	)	

AFFIDAVIT

Marc D. Janser, being first duly sworn on oath, states and deposes as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am a partner in the law firm of Pedersen & Houpt, P.C. I am one of the attorneys representing Respondent Norman Perlmutter in this cause. I have personal knowledge of the facts set forth in this Affidavit and if called to testify as a witness in this cause could testify competently with personal knowledge to the facts set forth herein.

2. I have received and reviewed Kathryn Perlmutter's Motion for Voluntary Dismissal. I consider this Motion to be a blatant attempt to forum shop and a bad faith effort to defraud Mr. Perlmutter of $910,000 loaned by him to Kathryn Perlmutter. The facts and circumstances that lead me to these conclusions are more fully set forth below.

EXHIBIT B

3. On Wednesday, October 14, 1987, at 9:30 A.M., Peer Pedersen, one of my partners, and I appeared in front of Judge Herman Knell in Courtroom 1603 representing Mr. Norman Perlmutter. Present on behalf of Kathryn Perlmutter was her attorney, Ronald Ladden from the law firm of Epton, Muller & Druth, Ltd.

4. Shortly after the court had ruled and the Court Order was entered, Pedersen, Ladden and I met in the hallway outside the Court to discuss the case. During this discussion Ladden repeated several times his earnest desire to move the case away from Judge Knell. I specifically recall Mr. Ladden stating that "he wasn't going to do business in front of this Judge" and that the first thing he intended to do was to "move out of this courtroom." Neither Pedersen nor myself made any response to these statements by Ladden.

5. At 4:00 P.M. on the same day, Mr. Ladden along with Michael Silverman, another attorney on behalf of Kathryn Perlmutter, came to my office to meet with me and further discuss the case. Present during this meeting were Silverman, Ladden, Pedersen and myself. During this meeting, Mr. Ladden made numerous additional statements that indicated he intended to change venue. I specifically recall discussing the timing of the case with Mr. Ladden. He stated that he did not intend to have a support hearing until "after he had moved the case out of Judge Knell's courtroom."

6. Based upon the foregoing statements made by Mr. Ladden I have no doubt that the Motion for Voluntary Dismissal filed by Mr. Ladden on behalf of Kathryn Perlmutter is an attempt to change venue without filing a change of venue motion. I consider this to be blatant attempt to forum shopping and an effort to indirectly change venue after he can no longer do so directly.

7. I also consider the Motion for Voluntary Dismissal to be a bad faith effort to defraud Mr. Perlmutter out of $910,000 loaned by him to Kathryn Perlmutter pursuant to an agreement made by the parties.

8. On May 11, 1987, the parties entered into an agreement whereby Norman would loan Kathryn $910,000 for the purchase of a residence and furnishings and Kathryn would agree to repay this loan in full at the time of an entry of a Judgment of Dissolution of Marriage. A copy of this agreement is attached hereto as Exhibit A.

9. Pursuant to this agreement Kathryn agreed to sign notes evidencing her indebtedness and her promise to repay the loan in full at the time of an entry of a Judgment for Dissolution of Marriage. Said loan did not bear interest.

10. Kathryn Perlmutter's Motion for Voluntary Dismissal is a bad faith effort to delay this lawsuit, delay the date for entry of a Judgment for Dissolution of Marriage, and to thereby delay or avoid repayment to Norman Perlmutter of the loan proceeds. I consider this to be a bad faith effort to avoid payment to Norman Perlmutter and thereby defraud him.

11. Further Affiant sayeth not.

/s/ MARC D. JANSER

SUBSCRIBED AND SWORN TO
before me this 27th day
of October, 1987.

/s/ MARY LOU BABBS
Notary Public

PROMISSORY NOTE

$93,000.00

Chicago, Illinois
May 12, 1987

FOR VALUE RECEIVED, KATHRYN PERLMUTTER, promises to pay to the order of NORMAN PERLMUTTER, Ninety-Three Thousand and 00/100ths Dollars ($93,000.00). This Note shall not bear interest.

Such amount is to be paid in lawful money of the United States of America, and is due and payable in full at the time of entry of a Judgment for Dissolution of Marriage between KATHRYN PERLMUTTER and NORMAN PERLMUTTER.

IN WITNESS WHEREOF, the undersigned has executed this Note as of the day and year first above written.

/s/ KATHRYN PERLMUTTER

EXHIBIT "C"

PROMISSORY NOTE

$818,159.92

Chicago, Illinois
June 12, 1987

FOR VALUE RECEIVED, KATHRYN PERLMUTTER, promises to pay to the order of NORMAN PERLMUTTER, EIGHT HUNDRED EIGHTEEN THOUSAND ONE HUNDRED FIFTY NINE and 92/100 DOLLARS ($818,159.92). This Note shall not bear interest.

Such amount is to be paid in lawful money of the United States of America, and is due and payable in full at the time of entry of a Judgment for Dissolution of Marriage between KATHRYN PERLMUTTER and NORMAN PERLMUTTER or upon the sale of the residence located at 17 East Scott Street, Chicago, Illinois, whichever event first occurs.

IN WITNESS WHEREOF, the undersigned has executed this Note as of the day and year first above written.

/s/ KATHRYN PERLMUTTER

EXHIBIT "D"

Partial Report of Proceedings of April 14, 1988

[23][1] * * * Q. Would you state your name, sir.

A. Peer Pedersen.

Q. And what is the nature of your occupation?

[24] A. I am a lawyer.

Q. And with whom are you associated?

A. The law firm of Pedersen and Houpt.

* * * * *

[30] * * * Q. When was it, the first time, that you heard from Mr. DuCanto?

A. On February 2, 1987.

* * * * *

[33] * * * Q. Now, on that day, what did you say to him and what did he say to you?

A. He called to tell me that he was representing Kathryn Perlmutter in her divorce proceedings against Norman Perlmutter. He indicated that they had filed a praecipe on January 29th of that date and that he thought it was going to be a big case; that there were a lot of problems involved; that there were a lot of issues that would have to be resolved; that apparently, there could be some visitation and custody problems and that, and that he wanted to keep the case in Cook County, and he wanted my agreement that the case would be held—would be kept in Cook County.

He further talked about our getting together to try to work out the details of how we would go about conducting discovery procedures and to work out a schedule, and

---

[1] Numbers in brackets refer to pages of the report of proceedings contained in the record filed in the Appellate Court, Second District.

to see if we couldn't get it done in [34] an expeditious manner.

Q. What did you say?

A. I said to him that I agreed that the case should be kept in Cook County; that we would follow this—we had followed this procedure before, and that we should arrange—oh, he also indicated to me that Mrs. Perlmutter had come in while he was on vacation and that she had had, I believe, several conferences with his partner, Mr. Charles Fleck, but now that he was back, that he intended to be the primary attorney involved in the case.

* * * * *

Q. What else did Mr. DuCanto say?

A. He also indicated to me that he didn't see any reason or purpose in our running 50 miles up to Waukegan every time we had to appear in court or to bring all the witnesses that we might have to use in the court proceedings.

Q. Did you discuss at that point either witnesses or documents or their voluminosity, if I may?

[35] A. I did at that time and in a number of subsequent conversations with him indicate that there would be voluminous documents and that there would be a lot of witnesses involved.

* * * * *

[37] * * * Q. I show you Husband 2 for identification. What is this document?

A. This is an agreement that was entered into as of May 11th between Norman Perlmutter and Kathryn Perlmutter.

Q. Did you prepare or cause that agreement to be prepared in your office?

A. The agreement was prepared under my direction, yes.

Q. And did you review it?
A. Oh, yes, indeed, I did.
Q. And did the Schiller firm review it?
A. Yes, they did.
[38] Q. And to your knowledge, did the parties execute the agreement?
A. Yes, they did.
Q. Is this a true and correct copy of the original, albeit it doesn't show the signatures?
A. Yes, it seems to be.
MR. FEIWELL: I move, your Honor, to admit Husband's Exhibit 2 for identification as Husband's Exhibit 2.
MR. LADDEN: I have no objection.
THE COURT: All right. Admitted.
(Husband's Exhibit No. 2 was admitted into evidence.)
BY MR. FEIWELL:
Q. Now, the whereas in that agreement bespeaks, if I may, of a case pending in Cook County, Illinois, does it not?
A. Yes, it does.

* * * * *

Partial Report of Proceedings of April 15, 1988

[155] * * * Q. Will you state your name?
A. Mark D. Janser, J-a-n-s-e-r.
Q. Where is your business located?
A. An attorney with the law firm of Pedersen and Houpt at 180 North LaSalle, Chicago, Illinois.

* * * * *

[161] * * * Q. In the telephone conversation with Mr. Fleck on either February 18th or February 19th, who were the parties involved in that telephone conversation?

A. There was only one conversation. It was between me and Mr. Pedersen and Charles Fleck.

Q. It was a three-way conversation?

A. That's correct.

Q. All three of you?

A. That's right. There was only one.

Q. And it was either on February 18th or February 19th, is that correct?

A. That's right.

Q. But both of those time records reflect the same [162] telephone conversation?

A. That's correct.

Q. What was said in that telephone conversation?

A. There were a number of things discussed during that conversation that concerned temporary issues relating to the children of the parties such as where they were going to be on certain days and who they were going to be with. But the principle discussion of the conversation was two fold.

Charles Fleck wanted to confirm with us that we were going to agree and have venue of the case stay in Cook County, and that they had filed a praecipe in Cook County. We had received the praecipe, and he wanted to make sure we were going to file our appearance and agree to venue in Cook County. And we said that we confirmed the agreement Peer had previously made with Joe DuCanto about having venue in Cook County, but we wanted to make sure there was consent to Pedersen and Houpt representing Mr. Perlmutter because, as everyone knew, we had previously represented Mrs. Perlmutter and we didn't feel comfortable in filing an appearance in Cook County on behalf of Norman Perlmutter unless there was consent to the potential conflict of interest due to our prior representation of Kathryn Perlmutter.

* * * * *

[169] A. I called [O'Brien] because we had received a letter from Joe DuCanto that had suggested that Mrs. Perlmutter was unhappy with the agreement she had made granting Mr. Perlmutter the exclusive use and occupancy of the Colorado home. And when I had given that letter to Mr. Perlmutter, he had said well, we made an agreement and now she's trying to back out of the agreement. And he was very unhappy with that.

And I called Jim O'Brien to tell him that they couldn't just back out of these agreements because we had made the agreement and Norman Perlmutter advanced the money so she could have a house, nearly one million dollars, and once she got this money, she wanted to back out of the agreements. And when I explained that to Jim O'Brien, I said look, this is becoming difficult for me because my client feels like he is doing business with a terrorist. Here we make the agreement and we advance the money in good faith and then she wants to back out of all these agreements. And he said oh, come on. It's not that bad. I said yes, it is that bad. We made the agreement and now you're trying to back out of it. And he said, well, we're having problems with Kathryn. She's difficult to deal with and you just have to give me time to talk to her.

* * * * *

[114] * * * Q. State your name.

[115] A. Joseph DuCanto.

Q. Mr. DuCanto, you're an attorney licensed to practice law in the State of Illinois?

A. I am.

Q. You're one of the principles of the law firm of Schiller, DuCanto & Fleck?

A. Correct.

Q. Concentration and expertise of your law firm is, I believe, exclusively family and matrimonial law, is that not true?

A. Correct.

Q. And you are the former attorney for Kathryn Perlmutter?

A. One of hers.

Q. And it was your firm who initiated in Cook County this dissolution of marriage proceeding?

A. Correct.

* * * * *

[116] Q. Am I correct that you filed a praecipe for dissolution of marriage on behalf of Kathryn Perlmutter on or about the 27th and 29th of January 1987?

A. My partner, Charles Fleck, did so.

* * * * *

Q. Your opposite number on behalf of Mr. Perlmutter turned out to be Peer Pedersen?

A. Correct.

Q. At any time prior to the filing of the praecipe did you communicate with—you, personally communicate with Mr. Pedersen for purposes of discussing any part of this litigation?

A. No.

Q. And subsequent to the filing of the praecipe, would I be correct, sir, that on or about the second day of February, 1987, that you, in fact, called Mr. Pedersen relative to the instituting of this litigation?

A. Yes.

Q. In that conversation, Mr. DuCanto, do you remember what you said to Mr. Pedersen and what he said to [117] you?

A. Certainly. I remember the purpose of the call to Mr. Pedersen was to advise him of the fact that we had

been retained by Kathy Perlmutter and we had, in fact, filed a praecipe for dissolution of marriage, and to connect with him in terms of a courtesy call and to check my basic assumption that he would be acting as counsel for Mr. Perlmutter; and therefore, I would extend the courtesy of sending the documents to him as opposed to placing the summons for service with the Sheriff of Cook County. I'm sure there are other aspects of that conversation, but that certainly and clearly was my initial—

Q. Was there any other part of that conversation you recall, sir?

A. I can't recall off-hand, no, sir.

Q. Do you have any independent recollection of having discussed the situs of the filing of the pending case?

* * * * *

[118] * * * A. I do remember some discussion, whether initiated by him or me, the fact that clearly the filing by us in Cook County was served to the relative convenience of not only the attorneys but perhaps the parties as well.

* * * * *

Partial Report of Proceedings
of April 27, 1988

[331] * * * Q. Would you state your name, sir?

A. Charles J. Fleck.

Q. And, Mr. Fleck, you are an attorney duly licensed to practice law in the State of Illinois?

A. Yes, I am.

Q. You are a named partner in the law firm of Schiller, DuCanto & Fleck?

A. Yes.

* * * * *

[332] * * * Q. Your firm formerly represented Kathryn Perlmutter, is that not correct,—

A. It is.

Q. —in a cause pending in Cook County?

A. Yes.

* * * * *

MR. LADDEN: Q. Was the opposing law firm not Pedersen & Houpt?

A. Yes.

Q. Did you ever have occasion to meet a gentleman by the name of Mark Janser, who is a member of that firm?

A. No.

Q. Did you ever have an opportunity to speak to Mr. Janser, to your recollection?

A. I may have—I don't recall—when Peer and I were having—

Q. I now call your attention to the latter part of February, 1987, and ask you if you ever had a conversation [333] with Mark Janser relative to the situs of the lawsuit?

A. Not that I can recall.

Q. I ask you if you ever had a conversation with either Mr. Pedersen, Mr. Janser or any other member of the law firm of Pedersen & Houpt relative to the situs of the lawsuit?

A. I might have mentioned that we were going to file a suit. I can't really specifically say we had a conversation regarding situs. We might have been talking about filing; that would have been about it.

* * * * *

Partial Report of Proceedings of February 14, 1990

[Holstein evidence deposition read into record.]

[1031] Q. State your name for the record.

A. Phillip F. Holstein, Junior.

Q. And where do you presently reside?

A. 977 Queens Street in Aspen, Colorado.

* * * * *

Q. Okay, now, have you had occasion to meet Cathryn Perlmutter?

A. Yes, I have.

Q. And when was the first time you met her?

A. I met Cathryn in the fall of 1988 from mutual friends.

Q. Can you tell me the reason for your meeting?

A. Cathryn Perlmutter was looking for a home to rent over the Christmas holidays and I traditionally rent my home, and my home was not rented.

Q. And this home is the one previously mentioned on Queen Street?

[1032] A. That is correct.

Q. Over the holidays, you are referring to the Christmas holidays?

A. That is correct.

Q. And for what period of time in weeks or months do you traditionally rent your home?

A. For two weeks.

Q. Okay. Now, this would have been the Christmas holiday period in 1988?

A. That's correct.

Q. Okay. And do you know approximately what week you are talking about as far as your rental of your home in 1988?

A. Essentially the last two weeks of December. It usually slopes over for a few days into January.

Q. Okay. Would it be a fair statement that this could have been the week immediately prior to Christmas, and the week immediately after Christmas?

A. That's right.

Q. Okay, now,—strike that.

During the Christmas holiday period in 1988, did you in fact put your home on the market for rent during that two week period?

A. Yes.

* * * * *

[1034] * * * Q. Okay. Now did you discuss with Cathryn Perlmutter the terms of which you would rent your house?

A. Yes.

* * * * *

[1037] * * * A. * * * She said to me that—she reiterated [1038] that she really wanted to rent the house for one week, and would be there for two weeks if that's what I required, but that for the the first week, she could only afford to spend $1,500.

* * * * *

MR. DAW: Q. Okay. Did you discuss with Mrs. Perlmutter the price of the first week and the price of the second week?

A. Well, yes. I said that we wanted the—we were able to get $9,000, approximately $9,500 for the second week. And so I certainly wanted that. And added the two figures together, and we came up with the price of approximately eleven thousand dollars.

* * * * *

[1053] * * * Q. In the past, prior to the time that you rented the home to Mrs. Perlmutter, had you ever exe-

cuted a lease for less than a two week period with any tenant on your home?

A. Not that I recall, no.

Q. So was it your custom and practice to have the tenant quasi-lease for this two week period, sign, for the two week period?

A. That's correct.

MR. FEIWELL: And I'm going to ask that that document be marked as Respondent's Exhibit Number One.

(Lease agreement marked.)

[1054] Q. I'm going to show you what has been marked as Respondent's Exhibit One and ask you to identify that document.

A. That's correct. That is the lease agreement which I signed with Cathryn Perlmutter covering the second week of the rental of the two weeks.

Q. Whose suggestion was it that the lease only cover a one week period if your custom and practice had been always to obtain a lease for the two week period?

* * * * *

A. It was Cathryn Perlmutter's suggestion.

Q. And is that in fact that document—strike that.

Is that in fact, that document, bear the signature of Mrs. Perlmutter and yourself?

A. That's correct.

Q. Why was it then that you executed a lease for one week rather than two weeks?

A. Well, it was Cathryn Perlmutter's request and since it was, it did not really make that much of a difference to me.

* * * * *

[1056] * * * Q. Now Mr. Holstein, you and Mrs. Perlmutter arrived at the figure of eleven thousand dollars. Did it make any difference to you whether she paid one

dollar for the first week and $10,999 for the second week or vice versa as long as you got $11,000?

[1057] A. It made no difference to me how she broke it down.

Q. At whose suggestion was it that the figure be broken down in the manner, matters that are set forth in the lease on Petitioner's Exhibit One, if I may? Was that you or Mrs. Perlmutter?

A. Well, it was Mrs. Perlmutter. I have to say it was relevant to our discussion as to what I could get for the two weeks on the open market.

Q. Well, relevant in what respect? Once you arrived at the price of eleven thousands dollars,—

MR. DAW: I'm going to object to this. We haven't had any testimony as to how he arrived at it.

MR. FEIWELL: Let me go about it this way.

Q. Did you and Mrs. Perlmutter arrive at a price for the two weeks?

A. Yes, we did.

Q. What was that price?

A. The price was $11,000 approximately.

Q. And once that price was arrived at, did you attach any significance to how Mrs. Perlmutter chose to divide the rent between the first week and the second week?

A. No. She could have divided it anyway she [1058] wanted to.

Q. And was it her desire then to pay you the sum of $9,450 for the second week, and $1,500 for the first week?

A. Yes.

* * * * *

[Filed February 5, 1990]

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

IN RE: THE MARRIAGE OF:)
KATHRYN PERLMUTTER,)
)
Petitioner,)
and)
)
NORMAN PERLMUTTER,)
)
Respondent.)

MOTION

Now comes NORMAN PERLMUTTER, by and through his attorney, ROGER A. WHITE & ASSOCIATES, and petitions the Court as follows:

1. That the parties' minor child, HARRY PERLMUTTER, has been seeing Dr. Galatzer-Levy as a patient since February, 1989, for emotional difficulties. The child has been seeing the psychiatrist based upon the recommendation of The Latin School, which is attached hereto as Exhibit A.

2. Neither KATHRYN or NORMAN were familiar with Dr. Galatzer-Levy, either professionally or personally. Dr. Galatzer-Levy was selected by KATHRYN after considering numerous psychiatrists and NORMAN consented to the selection.

3. Dr. Galatzer-Levy has concluded, as HARRY's treating psychiatrist, that a "systematic custody evaluation" of HARRY should be made by some other recognized psychiatrist. Dr. Galatzer-Levy has advised both KATHRYN and NORMAN of his recommendation. NORMAN is informed that KATHRYN is opposed to the Dr. Galatzer-Levy's recommendation.

4. NORMAN is informed and believes that pursuant to a letter dated on or about January 25, 1990, Dr. Galatzer-Levy advised Patricia Alberding of his recommendation. The Doctor had previously been advised by NORMAN, who had consulted with Patricia Alberding, that upon receipt of such a letter Patricia Alberding would act as the mediator on such an issue.

5. However, upon receipt of the letter, Patricia Alberding physically returned the letter to Dr. Galatzer-Levy with written advice to Dr. Galatzer-Levy that there was nothing that she could (or would) do and suggesting that Dr. Galatzer-Levy write Judge Jane Waller directly. Then, on January 31st, Patricia Alberding advised Dr. Galatzer-Levy by telephone call that his communicating directly with Judge Waller would be an impropriety.

WHEREFORE, your Petitioner prays that HARRY be evaluated by a psychiatrist chosen by the parents from a list of psychiatrists provided by Dr. Galatzer-Levy. In the event that NORMAN and KATHRYN are unable to reach an agreement, an independent psychiatrist should be chosen by Dr. Galatzer-Levy to conduct the evaluation.

/s/ ROGER A. WHITE /s/ NORMAN PERLMUTTER

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certified that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to matters the undersigned certifies as aforesaid that the undersigned verily believes the same to be true.

/s/ NORMAN PERLMUTTER

ROGER A. WHITE & ASSOCIATES, LTD.
21 North Skokie Highway
Lake Bluff, IL 60044
(708) 234-6680

(Letterhead Of)

THE
LATIN SCHOOL
OF CHICAGO
1888-1988

59 West North Boulevard
Chicago, Illinois 60610-1492
(312) 787-0820

December 15, 1988

Mrs. Kathryn Perlmutter
17 East Scott Street
Chicago, IL 60610-2309

Dear Mr. Perlmutter,

As we discussed in our phone conversation, I am recommending Harry begin psychological therapy in hopes that it will help him to cope with situations beyond his understanding.

If you need names of therapists, please contact Linda Hennelly.

Thank you for being receptive to the recommendation.

Sincerely,

/s/ PAT PETERSON

PP/ar

cc: L. Hennelly
Mr. Perlmutter

EXHIBIT A

(*Letterhead Of*)

Robert M. Galatzer-Levy, M.D., S.C.
180 North Michigan Avenue
Chicago, Illinois 60601

February 1, 1990

Mrs. Katherine Perlmutter and Mr. Norman Perlmutter

Dear Mr. and Mrs. Perlmutter:

It is my medical opinion that the custody arrangements for your son, Harry, who I am treating, should be systematically evaluated by a psychiatrist competent to make such an independent evaluation. I have previously communicated this opinion to each of you verbally.

Sincerely,

/s/ ROBERT M. GALATZER-LEVY, M.D.

cc: Donald Schiller
Donald Rubin
Patricia Alberding

Partial Report of Proceedings of February 18, 1990

[629][1] * * * MR. WHITE: I spoke with Ms. Alberding yesterday. I was originally going to attach Ms. Alberding's affidavit to the response. Ms. Alberding felt that she would be better served by coming to court, and explaining to the court what has happened during these transactions. I changed the response in the motion to reflect that letter. I was going to file that, but it was late last night—

THE COURT: Would you remind me what your original request was?

MR. WHITE: Yes, Judge. Our original request was for an independent medical examination of Harry Perlmutter, who is being treated independently by Dr. Galatzer-Levy.

THE COURT: It was termed something other than an independent medical examination.

MR. WHITE: Well, the way it was termed, Judge— Well, here is a copy of my motion, and Dr. Galatzer-Levy said that the custody arrangements for your son, [630] Harry, should be systematically evaluated by a psychiatrist. This is the letter from Dr. Galatzer-Levy—

* * * * *

So the original motion requested that either Dr. Galatzer-Levy pick an independent psychiatrist, or give the parties three names, and that the parties, of those names, pick an independent psychiatrist.

The court felt that it was a subject of mediation. Ms. Alberding did not feel it was a subject of mediation, and

---

[1] Numbers in brackets refer to pages of the report of proceedings contained in the record filed in the Appellate Court, Second District.

told Mr. Perlmutter that, and suggested to Dr. Galatzer-Levy that Dr. Galatzer-Levy write the court directly. Evidently, we did not make that clear to the court.

THE COURT: All right. What is clear to me was that Mr. Perlmutter took action on this request without consulting with Mrs. Perlmutter, and it relied upon the independent mediator to initiate the [631] mediation on this particular matter without consulting with Mrs. Perlmutter to determine whether mediation was even needed.

* * * * *

[632] * * * MR. WHITE: The first thing is if you think that we filed that motion without having some basis in law or fact, the court is absolutely in error. [633] Mr. Perlmutter visited with Ms. Alberding, and Ms. Alberding said to Mr. Perlmutter that this is not the type of thing that you and Kathryn are going to agree on, and this is not the type of thing in mediation, and she suggested that Dr. Galatzer-Levy to contact you directly. Now, we didn't come in here just on a wing and a prayer with this petition without first talking to Ms. Alberding about it, and that's why she is here. For them to get sanctions against us, they have to prove that we did this without any basis in law or in fact. I am ready to go to a hearing on that because Ms. Alberding still feels that way.

THE COURT: What I objected to was the procedure that brought this issue to a head. Instead of your going to a mediator, you go to the other parent and say there is a problem, and I want to talk about it; let's see what can be done. If it is clear that the other parent disagrees about your request, then you tell her that you are going to be selecting a mediator on that issue.

MR. WHITE: We have a mediator. Norman spoke [634] with Ms. Alberding, and Ms. Alberding—

THE COURT: It is not clear to me that you took the first step.

MR. WHITE: Ms. Alberding is here.

THE COURT: That has nothing to do with Ms. Alberding. It has everything to do with Mrs. Perlmutter. Was the first step taken with Mrs. Perlmutter?

MR. WHITE: Did we contact—Mrs. Perlmutter received a copy of that letter. It showed she received a copy of the letter. We do not believe that Mrs. Perlmutter would agree to an independent evaluation. Did we contact her, no.

THE COURT: Motion to strike may not be filed, and sanctions are imposed, and will be assessed at—What is your regular rate?

MR. SCHILLER: Your Honor, we spent four hours on Saturday—four attorney hours on Saturday, and three attorney hours when the case was up on Monday, for a total of seven. Mr. Stein and I make up those seven hours. There were other people at the hearings, but with regards to those, Mr. Stein and my hours—primarily Mr. Stein's, and I think a blended rate that we would ask for would be [635] $250 an hour for those seven hours.

* * * * *

Partial Report of Proceedings
of April 4, 1990

[3175] * * * THE COURT: Well, first of all I'd like to say that I thank the parents for being so candid in their assessment of the situation and of their child, and if I didn't believe this before I truly believe it now, that [3176] both parents love their child, their children, and would like to do what is best for the child and that is what I want to do, too.

The request that Norman Perlmutter makes is to on an interim basis until more information can be made available to the court as to what the child's condition is and what the appropriate course of treatment might be, to continue with the treatment that has been embarked upon to this point, and in viewing that request I have conducted the hearing in a somewhat unusual manner by hearing first from the attorneys and then informally from the parties and have taken some evidence on this request for an injunction that I might not necessarily have done if it were not for the fact that a child is involved and I wanted to get direct information from the people who are right there with that child.

I didn't know very much about Harry before and I had assumed that he was suffering from the impact of a divorce and that that was the primary issue. Hearing from the parents I realize that he is a unique individual, he is—which I of course should have known already because everyone is unique, but he has some peculiar aspects to his personality that developed before this divorce or were in existence before this [3177] difference ever became a reality, and those things have to be viewed along with the context of this divorce, so it's not a situation where what he needs is someone to talk to to express his feelings about the divorce. He may need some more intensive treatment and that is what had been embarked upon.

* * * * *

Partial Report of Proceedings
of September 11, 1990

[5213] * * * MR. REUBEN: The thing—The court's order was all fees be considered at one time.

THE COURT: That would be my intention. I would also sort of gratuitously say that I would expect that the parties would primarily bear their own responsibility for fees, but I think there may be some arguments why there should be some contribution because of specific issues that you raise in your motion, for example, on discovery or whatever other reasons why they should be.

MR. REUBEN: This judgment is not final, as I understand the law.

THE COURT: That's right.

MR. REUBEN: We have raised—

THE COURT: I think that it is final for the purpose of computing the interest.

MR. SCHILLER: It's not appealable, but it's final.

Partial Report of Proceedings
of February 4, 1991

[5493] * * * [MR. REUBEN]: Now, Mr. Stein is in a dilemma. I don't know how he's going to get out of it. And he's put the court in a dilemma and it's very simple. The requirement to award fees against the other side is to have specific, discreet time sheets. Time to so-called wrongdoing. The reprehensible conduct which has occurred every day, to the time expended because of it. That's critical. That is threshold. And the conduct was so outrageous that he's railed here again today. Before they came in sanctions were granted by your Honor and I'll come back to that in connection with the motion for change. The first day of trial your Honor awarded sanctions for Harry and I'll come back to that.

They're outraged but never did they keep their time so that anybody can relate to that they're now talking and pleading about to their time with the exception, I think, of about seven hours for Doherty. And I dare say

it was impossible for me to do. It was their [5494] burden, and I don't care what he says, you won't be able to do it. * * * And not—and his records are not that way. And I don't think you have any basis for awarding a dime, except maybe six or seven hours, and he's told you all of this conduct. He'll never tie it to one time sheet.

* * * * *

[5501] * * * MR. REUBEN: * * * I also want to make one comment about Mr. Katz' petition. That petition is insufficient in the law for a very simple reason. Can't have it both ways. I asked Mr. Katz if he carefully read it. He said he had. Stood by it. You heard Mr. Stein here today. You heard Mr. Daw on December 14, and I have the transcript, say this is not a 508 case.

If you read Mr. Katz' petition on its face, it's a 508 petition. That's what he's coming in pursuant to. He pleads no sanctions or just pled the time, typical standard 508 on its face referring only to that section. [5502] So I don't think under any circumstance his petition can be treated any other way but to deny it out of hand because that's not the theory of what the proceeding is about. He doesn't set forth any misconduct or anything else. But he, too, didn't allocate. He, too, didn't allocate.

* * * * *

[5507] * * * THE COURT: Any rebuttal?

MR. STEIN: I didn't know exactly how the court wanted us to proceed with this petition. One of the things that preliminarily the court suggested and we accepted was that we would stand on our petition, and not go into each and every allegation and match time slips to the allegations themselves, but merely submit ourselves to [5508] cross examination.

During direct—during redirect, I believe Mr. Daw asked me if, in fact, the time records that are attached as an

exhibit accurately reflect the time that we expended on those issues, and they do. I said that they did.

In preparation for our direct testimony—I have no problems in sharing this with the court—we took our exhibit. The only reason we didn't do that is the court asked us to stand on the exhibit itself rather than go through line by line.

MR. REUBEN: I'll object. The court never asked you to stand on the exhibit. I suggested you agreed to doing that. Now he's trying to open—re-open the case and put in an exhibit that I have never seen that he wants to share with the court.

MR. STEIN: I'm doing that—

MR. REUBEN: Anything is proper, anything that the court allows will happen, but I think that at this stage to do that is not fair. Proofs are closed.

MR. STEIN: Proofs are closed. My closing reply is not. And I'll offer to do it either as an exhibit, or I'll, in my reply, respond to Mr. Reuben's allegation and go through each and every one and tell you what each time [5509] slips relates to in terms of the issue as enunciated in the pleading.

MR. REUBEN: I'll object. He should have done that by testimony. That was—he's trying to enhance his time sheets which are deficient in closing argument. When I pointed out—and trying to enhance today a contemporaneous record of two—one year ago. If the court let's him, I have no way of stopping, just make my record. I have no way of dealing with that now. He was on the stand. He could have had all sorts of opportunities to do so. He had to do—his petition should have done so. Wasn't done. He's going to do it at this late hour or attempt to do it by closing argument. Getting back. I don't know how. It's improper.

THE COURT: I thought—We would have never scheduled because we're coming here tomorrow. Apparently, there were expectations as to what was going to be relied upon with regard to the affidavit and how it would relate to the petition. And my expectation was that on cross examination if you had some questions about how the time was related to their petition, then you could have an opportunity to go into it. If that expectation was not the same expectation as you had, then we'll start again tomorrow, and I'll declare a mistrial on the petition for [5510] attorneys' fees.

MR. REUBEN: Well, I would like to respond. I think, your Honor, that I am entitled, if the proof is defective, not to cross examine and open it up.

THE COURT: I'm declaring a mistrial. We'll start again tomorrow.

MR. REUBEN: Does your Honor want a written order?

THE COURT: You may. You may. Whatever is your pleasure.

Partial Report of Proceedings of February 5, 1991

[5535] * * * THE COURT: But I think where my displeasure yesterday came in was from the fact that—maybe I'm going to be repeating myself—but there have been allegations [5536] of practices that I think the court needs to take some notice of. And it's not merely to compensate Mrs. Perlmutter for the additional attorneys' fees that she may have had to expend, but it's for the administration of the system and the way lawyers conduct themselves in this court. And some very serious allegations have been made and I want to have this investigated. So it's beyond just sanctions for recompensing Mrs. Perlmutter.

* * * * *

[5551] EXAMINATION (Voir dire)
BY: MR. REUBEN

Q. Exhibit 4 is your effort to interpolate from your time records the time you spent on the matters that you claim are sanctionable, is that correct, Mr. Stein?

A. Exhibit 4 reflects the time that we expended on the issues that we believed to be abuses of the discovery process.

Q. How was that exhibit derived, how was it [5552] created?

A. That was created by our reviewing our time slips, by our reviewing the pleadings of the file, by our reviewing the court orders entered in the case, principally those were the documents that we looked in the preparation of both the petition and the exhibits supporting the petition.

Q. So this is a document in effect prepared for litigation, is that correct, for this proceeding?

A. This particular exhibit with the exception of the fact that we put on here the coding that we—that we used, essentially is a summation of our time records on the issues that we believed were sanctionable.

* * * * *

[5558] * * * MR. REUBEN: I'm going to object. My objection was based—and I'll simply state the facts and the court can rule—we did direct an interrogatory which was answered which said with regard to the fee petition presently pending do you have time records for all the time detailed on Exhibit A attached to your fee petition?

MR. DAW: Here is your copy.

MR. REUBEN: And the answer is yes. And then they said are there any other time records which support the fee petition. And they said no. That is, therefore, not a

time record. It's an exhibit which was prepared for litigation and which is an argument. It's not a record based on this answer. In fact, they said it was only prepared a week ago. I don't think it's a proper document.

THE COURT: Well, it's not a time record, is that your position? You're not saying it's a time record?

MR. DAW: I agree it's not a time record.

MR. REUBEN: It's not a record of anything. It's—

[5559] THE COURT: Well, from my perspective, what it is is a summary of what his testimony would be if he had to go through every single hour that he says he spent with regard to these various so-called abuses. Now, we can either have this admitted into evidence or we can have him testify that he spent a half an hour conferring with Don Schiller and that he spent 45 minutes on the telephone to Don Reuben and on and on and on. Or you can have—we can accept this as the document as a summary of his testimony, which then subjects him to your cross examination to attack the credibility of his preparation or however else you wish to cross examine him.

MR. REUBEN: I'm not suggesting we go through every half hour. I'm not prepared to accept your characterization of it. But I gather your Honor is prepared to receive it and I guess I'd better sit down and shut up.

THE COURT: I'll accept. It says summary of the testimony with regard to how much time he believes he spent on each item listed in paragraph 4 A, B and C.

* * * * *

Supreme Court, U.S.
MAR 8 1993
OFFICE OF THE CLERK

No. 92-1340

In The

Supreme Court of the United States

October Term, 1992

NORMAN PERLMUTTER,

Petitioner,

vs.

KATHRYN PERLMUTTER,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

DONALD C. SCHILLER
Counsel of Record
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3397
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QUESTIONS PRESENTED

1. Does the concept of due process demand that a litigant be allowed initially to raise the issue of pervasive judicial bias and prejudice in his Appellant's Brief, when the alleged evidence of the bias "unambiguously" emerges at the end of post-trial proceedings and the litigant elects not to raise the issue before the trial court in a post-trial motior because an Illinois Supreme Court Rule makes such a motion optional?

2. Does a series of adverse rulings following a hearing on the issue of sanctions for various trial and pre-trial actions by a litigant amount to proof of judicial bias and prejudice, when the trial proceedings were admittedly conducted with courtesy and fairness?

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II. The Petitioner has waived review of the issue of judicial bias and prejudice depriving him of some due process right by failing to raise the issue in a timely fashion. 8

III. The trial court's rulings at the end of the case displayed no emergent bias and prejudice. 10

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APPENDIX

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No. 92-1340

In The

Supreme Court of the United States

October Term, 1992

NORMAN PERLMUTTER,

Petitioner,

vs.

KATHRYN PERLMUTTER,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Kathryn Perlmutter, respectfully requests that this Court deny the Petition for Writ of Certiorari that seeks review of one portion of the opinion issued by the Illinois Appellate Court, Second District. That opinion is reported at 225 Ill. App. 3d 362, 587 N.E. 2d 609.

STATEMENT OF THE CASE

On October 21, 1987 Kathryn Perlmutter filed a petition in the Circuit Court of Lake County, Illinois to dissolve her 9-1/2 year

marriage to Norman Perlmutter. At the time, Norman Perlmutter was the CEO of Heitman Financial, Ltd., a commercial real estate corporation that identifies, purchases, manages and ultimately sells commercial real estate on behalf of its advisory clients, including insurance companies, pension funds, tax exempt funds and similar entities. Heitman has several offices nationwide and manages a portfolio valued at approximately $5.6 billion (P.X. 213). Both parties had accumulated significant personal estates prior to the marriage; as originally determined by the trial court, Mrs. Perlmutter owned $2,309,799 in stock proceeds, while Mr. Perlmutter owned $4,153,270 in business interests, real estate, personal property and various investments. The value of their marital estate was ultimately found to be $18,031,611 (App. 4-6), of which Mrs. Perlmutter was awarded $3,350,000 in real estate, $1,371,263 in bank and investment accounts and other personalty, and $2,451,000 in cash from Mr. Perlmutter, for a total of $7,172,263.

After the court had issued its memorandum opinion, and while Mrs. Perlmutter's counsel were preparing the written judgment, both her present and former attorneys filed Motions for Clarification raising, *inter alia*, the issue of attorneys' fees; the court had omitted any mention of fees in its Opinion Letter (Resp. App. *infra*, 1a). Mrs. Perlmutter's former attorneys had already filed a fee petition, and the Schiller firm's motion sought fees for conduct by Mr. Perlmutter and his attorneys during the discovery process (C. 2794).

During pre-trial and trial proceedings, each firm had already secured rulings finding certain conduct of Mr. Perlmutter's to be sanctionable, although no penalties had yet been imposed: On October 11, 1988 the court held sanctionable Mr. Perlmutter's pursuit and last-minute abandonment of a change of venue to another county, in violation of Ill. Rev. Stat. 1987, ch. 110, § 2-611 (Resp. App. 11a, C. 837, 843); also sanctionable was the refusal of

one of Mr. Perlmutter's witnesses to answer questions and turn over documents (C. 2278) and his last minute injection into the proceedings of issues involving the parties' older child, which had been resolved earlier by the parties' Joint Parenting Agreement (C. 578).

On September 11, 1990, during argument on the Motions for Clarification, after both firms had pointed out the omission of fees and the Schiller firm noted its intent to seek an award of attorneys' fees for several abuses of discovery by Mr. Perlmutter and his attorneys (C. 2794), the court responded that it had not mentioned fees in its written findings and decision but would entertain any fee petitions filed (Resp. App. 2a). Upon entry of the Judgment of Dissolution of Marriage on September 12, 1990, the court, under the authority of Ill. Rev. Stat. 1989, ch. 110, § 2-1303 (Resp. App. 12a) also ordered judgment interest to accrue on the award of cash Mr. Perlmutter was to pay to Mrs. Perlmutter (C. 2840).

The court and counsel also discussed at length whether the judgment was final, enforceable and appealable. After the judgment was entered Mrs. Perlmutter's attorneys had begun collection proceedings; Mr. Perlmutter's counsel requested and was granted leave to file a Petition for Rehearing and to Vacate a portion of the judgment under Ill. Rev. Stat. 1989, ch. 110, § 2-1203, the effect of which was to stay enforcement of the judgment. The court and counsel also concluded that the judgment was presently not appealable because of the outstanding fee petition by Mrs. Perlmutter's prior attorney; however, the court noted, the interest issue was the "kicker" because interest would accrue on the final judgment from the day of its entry, September 12, 1990 (R. 5228-29; C. 2840).

On October 10, 1990 both of Mrs. Perlmutter's attorneys, Schiller, Du Canto and Fleck and Stephen Katz, timely filed petitions for fees as sanctions; Katz later amended his petition (C. 2861, 2883, 3009).

The hearing on the petitions for attorneys' fees opened on February 4, 1991 with counsel for Mr. Perlmutter, Don Reuben, stipulating that the affidavits filed by Mrs. Perlmutter's former counsel would stand as their direct testimony; he then waived cross-examination (Resp. App. 3a). He also agreed that the petitions filed by Mrs. Perlmutter's present counsel would stand as their testimony (Resp. App. 4a). When Mrs. Perlmutter's counsel and the court confirmed that the next step would be cross-examination by Reuben, he agreed and went on to waive cross-examination of Donald Schiller, of the Schiller firm (Resp. App. 4a).

The hearing proceeded; Reuben conducted very little cross-examination, most of it focused on the correlation between the information on the contemporaneously-recorded time slips and the conduct for which fees were being sought. Arnold Stein of the Schiller firm explained the process by which the time attributable to the claimed misconduct had been extrapolated from the recorded time slips: first the specific conduct was identified; then the references to the conduct, to the ensuing strategy conferences, and to the resulting pleadings were located on each attorneys' time slips; and finally the extrapolated time entries and resulting fees were organized into the fee petition (Resp. App. 4a-5a).

During closing argument, Mrs. Perlmutter's attorneys summed up what their evidence had shown. Katz reviewed his activities in connection with Mr. Perlmutter's Change of Venue Motion, which had already been held to be the subject of sanctions, as well as Mr. Perlmutter's actions in preventing Mrs. Perlmutter from using their vacation home in Colorado (R. 5464-69). Stein described in detail each of the various incidents that constituted a sanctionable course of conduct by Mr. Perlmutter and his attorneys during discovery (R. 5473-91).

Reuben's closing argument, however, attacked the Katz and

Schiller petitions because the attorneys had not presented specific, discrete time sheets as backup to their extrapolated entries (R. 5493). Further, he argued, if the attorneys and the court had found the conduct of Mr. Perlmutter's counsel so reprehensible, under the authority of *In re Himmel,* 12 Ill. 2d 531, 533 N.E. 2d 790 (1988), they were obligated to report that conduct to the Illinois Attorney Registration and Disciplinary Commission (R. 5495). Finally, because Mrs. Perlmutter's attorneys had failed to supplement their petition with testimony, any award would be a "fraud for lack of any predicate on the time" (R. 5495). He also attacked the previous findings of sanctionable conduct concerning the change of venue motion and the petition concerning the parties' children — the first on the same basis of deficient time entries, the second on the basis that the child did need psychiatric care (R. 5501-2).

In response, Stein reminded the court of the procedure that had been agreed upon at the beginning of the hearing, and he then proposed to use his closing argument to go through every time slip and connect it to the entries on the petition (Resp. App. 5a-6a).

At this point, the court stopped the argument, clarified what its expectations had been regarding the progress of the hearing, noted that its expectation was apparently not the same as Reuben's, declared a mistrial, and concluded by saying that the fee hearing would start over again the next day (Resp. App. 6a).

When the hearing reconvened on February 5, 1991, the court amplified its reasons for declaring the mistrial (Resp. App. 7a). The hearing then proceeded; Stein testified to every act of Mr. Perlmutter or his attorneys deemed sanctionable, and he identified the hours spent dealing with the conduct by means of several exhibits — the Fee Petition, the original time records, the pleadings and orders that dealt with the various acts of sanctionable conduct, and a document that summarized the total time expended on each type of conduct deemed abusive.

Following the conclusion of the hearing, the court issued its findings and ruled that sanctions were appropriate for Mr. Perlmutter's two-count motion for change of venue to a different county, since inadequate investigation had been done on one count, and subsequent events proved the other count to have been frivolous (App. 78). Mr. Perlmutter also was found to have improperly by-passed the procedures set forth in the Joint Parenting Agreement for dealing with the children's custody and psychiatric care (App. 78); because these were emotional issues important to the parties, Mr. Perlmutter's action improperly caused great risk to the custody arrangement (App. 79).

As to the discovery abuses, the court granted fees as the sanction for seven actions or groups of actions related to the discovery process (App. 80), all of which had been fully described in pleadings filed contemporaneously with the activity (C. 900, 1066, 1077, 1276, 1370, 1386, 1892, 1954, 2010, 2042, 2107, 2278, 2337) as well as in Stein's testimony, and for which specific time had been extrapolated from the time slips (C. 2861). Fees were also awarded to Katz for his work concerning Mr. Perlmutter's refusal to obey a court order to pay Mrs. Perlmutter's condominium rental cost for one week in Aspen, Colorado at Christmas (App. 80-81).

After the entry of judgment in the sanctions proceeding, Mr. Perlmutter filed an appeal. At no point prior to his initial Appellant's Brief did he claim bias or prejudice on the part of the trial court, and the Appellate Court of Illinois held that he had waived the issue of trial court bias or prejudice by failing to raise it in a timely manner. Further, not until his Petition for Rehearing to the Appellate Court did he mention the words "Constitution" or "due process rights" in connection with his allegations of bias and prejudice on the part of the trial court; the Appellate Court refused to reconsider its decision. When the Illinois Supreme Court twice denied Mr. Perlmutter's request that it review his case (App. 31, 32), he filed his Petition for Writ of Certiorari before this Court.

REASONS FOR DENYING THE WRIT

I.

THIS MATRIMONIAL CASE PRESENTS NO SPECIAL OR IMPORTANT REASON FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Rule 10 of this Court, which sets forth the character of reasons for which review of a federal or state court decision might be granted, states in paragraph (c) that one such reason occurs "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Contrary to the statements contained in Section I of Mr. Perlmutter's Petition, absolutely nothing in this case warrants any further review. The state court did not decide some important, virgin question of federal law needing to be settled by this Court, nor has a state court decided a federal question in a way that conflicts with other decisions of this Court. In fact, Mr. Perlmutter did not conclude that his case even raised a so-called "federal question" until after publication of the appellate court's opinion; all he had previously argued was that the trial judge's rulings sanctioning him for various behaviors proved that she was biased against him, and he did not raise that issue until his initial Appellant's Brief.

Despite petitioner's arguments in Section I of his Petition concerning the litigation explosion, the inexperience (and presumably faulty decisions) of new judges, the peculiarly intimate nature of divorce cases, and the impact that decisions in such cases have on society, all that actually occurred in the present

case is that one party was intensely unhappy with the result, the Appellate Court of Illinois reversed and remanded essentially only one issue, and the Illinois Supreme Court did not judge the case significant enough to warrant further review.

II.

THE PETITIONER HAS WAIVED REVIEW OF THE ISSUE OF JUDICIAL BIAS AND PREJUDICE DEPRIVING HIM OF SOME DUE PROCESS RIGHT BY FAILING TO RAISE THE ISSUE IN A TIMELY FASHION.

The foundation of Norman Perlmutter's argument to this Court — and the sole legal basis for his petition — is that he was deprived of his constitutional rights of due process by being forced to try his case before a judge whose bias and prejudice against him did not emerge until the entire trial and post-judgment proceedings were concluded, when he no longer had a "meaningful opportunity" to raise the issue.

In response to Mr. Perlmutter's raising the issue in his appeal to the Appellate Court of Illinois, Mrs. Perlmutter argued and the court agreed that his failure to raise the issue of judicial bias and prejudice until his Appellant's Brief constituted a waiver of the argument; his argument that all of the evidence of so-called bias occurred after the judgment was entered was not true (App. 26), and he had not taken advantage of any available opportunity to petition for a new trial or request a change of venue during or after the post-judgment proceedings (App. 26-7) during which the court's bias "emerged", either of which would have preserved the issue for appeal. His counsel never mentioned the concept of bias and prejudice, much less a due process deprivation. Finally, during the entire two days of hearing on Mrs. Perlmutter's request for fees as a sanction for various actions by Mr. Perlmutter and his attorneys over the three-year pendency of the case, the very

hearing during which Mr. Perlmutter now argues the court's bias became apparent, his counsel never once mentioned the concept of bias and prejudice, much less a due process deprivation.

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it . . . While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts . . .

Yakus v. United States, 321 U.S. 414, 444-45, 64 S. Ct. 660 (1944). Because even fundamental constitutional rights may be waived if not initially asserted, *see Henry v. State of Mississippi*, 379 U.S. 443, 85 S. Ct. 564 (1965), "[A]ny personal hardship that petitioners suffer they must be considered to have brought upon themselves." *Litchter v. United States*, 334 U.S. 742, 789-93, 68 S. Ct. 1294 (1948), as cited in *Presque Isle TV Company v. United States*, 387 F.2d 502, 506 (1st Cir. 1967).

Mr. Perlmutter attempts to cure this defect by arguing that "the evidence of the trial court's bias and prejudice only became *unambiguously* apparent at the very conclusion of all trial court proceedings and could not in good faith have been raised any earlier" (Petition, p. 6, n. 5, emphasis added). Because Section 2-1203 of the Illinois Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, § 2-1203, "Motions After Judgment in Non-Jury Cases"), has been held not to be mandatory for purposes of preserving issues for appeal (unlike the application of its counterpart in jury cases, § 2-1202), Mr. Perlmutter contended before the Illinois Appellate Court that he was not required to file such a motion (App. 25) even though it would have been an obvious opportunity to bring the

issue before the trial court. Neither did he move for a change of venue on grounds of judicial prejudice, which, even if filed at the conclusion of all proceedings, would have preserved the issue for review.

The principle that allegations of judicial bias, to be preserved, must be raised "at the earliest practical moment after prejudice is discovered", *In re Marriage of Kozloff*, 101 Ill. 2d 526, 532, 463 N.E. 2d 719 (1984), is not abrogated simply because a litigant claims he did not discover the prejudice until all the proceedings were concluded. If a post-trial motion under Ill. Rev. Stat. 1989, ch. 110, § 2-1203 was Mr. Perlmutter's last opportunity to raise a claim of prejudice before the trial court, he cannot excuse his failure to do so by resorting to the argument that, under Supreme Court Rule 366(b)(3)(ii), such motions are discretionary; "That rule provides that *issues which have been considered* by the trial court in a non-jury case need not be included or specified in any post-trial motion to be preserved for appeal . . ." *Page v. Estate of Page*, 66 Ill. App. 3d 214, 383 N.E. 2d 615, 618 (1978) (emphasis added). Therefore, if the trial court has been given no opportunity to rule on a given issue, either by objection during trial or by post-trial motion, a reviewing court will not consider the issue. Such is the case here.

III.

THE TRIAL COURT'S RULINGS AT THE END OF THE CASE DISPLAYED NO EMERGENT BIAS AND PREJUDICE.

The heart of Norman Perlmutter's Petition to this Court consists of his listing several alleged actions taken by the trial court that he believes demonstrate prejudice and bias. His characterization of those actions is most charitably described as wildly inaccurate.

First, the trial court never "gratuitously" invited sanction proceedings against Mr. Perlmutter. Its statement on September 11, 1990 that "there may be some arguments why there should be some contribution because of specific issues that [the Schiller firm] raise[d] in [its] motion" confirms that Schiller's request for sanction fees was already before the court prior to entry of the dissolution judgment; paragraph 4 of Schiller's Motion for Clarification listed several discovery abuses for which it sought fees, including non-production of documents, Supreme Court Rule 220 problems with disclosure of experts and their opinions, and misrepresentations concerning the development of property in Colorado (C. 2795).

Further, the court's statement was not made in isolation, as Mr. Perlmutter would have this Court believe, but in the context of a prolonged discussion between the court and all counsel about fee petitions, since the court had omitted any mention of fees in its letter opinion (Resp. App. 1a). Given the obvious fact of the already existing Schiller petition, under no reasonable interpretation of language can the Court's statement in context be described as a "s*ua sponte* solicit[ation of] a petition for sanctions against the petitioner" (Petition, p. 3).

Second, the court never "*sua sponte* order[ed] that prejudgment interest on a $2,415,000 cash award against petitioner begin to accrue immediately." (Petition, p. 11). The interest that was ordered was *post*-judgment interest, authorized by Ill. Rev. Stat. 1989, ch. 110, § 2-1303 (Resp. App. 12a) to accrue on all final judgments. Under Illinois law, such post-judgment interest accrues from the date of judgment even if the Appellate Court lowers the award on a subsequent appeal. *Phelps v. O'Malley*, 187 Ill. App. 3d 150, 543 N.E. 2d 311, *appeal denied*, 128 Ill. 2d 671, 548 N.E. 2d 1077 (1989).

Mr. Perlmutter also claims that although the trial court's

actions during the first fee hearing created insufficient justification for a charge of bias or prejudice against him, it *sua sponte* ordered a mistrial to permit the respondent to cure fatal flaws in her proof; in the second and *de novo* sanction hearing, the court admitted into evidence, over objection, an allegedly "spurious self-serving document prepared by Mrs. Perlmutter's attorneys for the hearing . . . to cure the defect in [her] proof" (Petition, p. 12). However, Mr. Perlmutter's description of the trial court event bears no relationship to the actual occurrences, as shown by the Report of Proceedings (Resp. App. 3a).

The cause of the court's declaring a mistrial was Reuben's failure to comply with the stipulation he had made to the court at the beginning of the hearing; he had stipulated that he would accept the affidavits and fee petitions of Mrs. Perlmutter's counsel as their direct testimony (Resp. App. 3a), and he then agreed with the conclusion by both the court and counsel that he would conduct whatever cross-examination he desired in order to test the support for their requests.

Instead, Reuben refrained from any cross-examination on the issue of the claimed sanctionable conduct but questioned Katz and Stein solely on their record keeping. When in closing argument he claimed that the petitions and affidavits were insufficient to support a fee award as a matter of law, and that Mrs. Perlmutter's counsel had fatally failed to amplify their petition with direct testimony, the judge declared a mistrial because she and Mrs. Perlmutter's counsel had been misled by Reuben's stipulation (App. 123); in addition, Reuben had mounted no challenge to the characterization of any specific event as one warranting a sanction. Therefore, the trial *de novo* allowed *both* parties the opportunity to cure any defects in their presentation. Only after allowing both parties to re-present their evidence and hearing argument of counsel did the court render any decision on the issues.

Kaiser v. MEPC American Properties, Inc., 164 Ill. App. 3d 978, 518 N.E. 2d 424, 427 (1987), currently the definitive Illinois case on the issue of attorneys' fee petitions, held that a petition for fees must specify the services performed, the time expended on the services, and the hourly rate charged. Both the Schiller and Katz petitions present that information (C. 2861, 3009). In addition, the same judge had presided over all the interim court appearances and hearings, and knew the events as they unfolded. Under Illinois law, a court may rely on its own knowledge and experience in determining the fee to be awarded. *In re Marriage of Orlando*, 218 Ill. App. 3d 312, 577 N.E. 2d (1991).

Neither was there bias or prejudice in the court's admission into evidence of the exhibit setting the fee summary prepared by Mrs. Perlmutter's counsel; far from being a "spurious self-serving document" as charged, such a summary, if prepared by a witness competent to testify to the underlying documents, as it was here, is readily admissible in Illinois as long as the underlying documents have been made available for inspection. *In re Marriage of Kaplan*, 149 Ill. App. 3d 23, 30, 500 N.E. 2d 612 (1986).

Mr. Perlmutter next alleges as proof of bias the "inordinately large number of sanctions against petitioner (eleven)" and the "lack of definitive findings or description as to the particular acts being condemned and punished by the court" (Petition, p. 12). As noted earlier in this Brief in Opposition, for years Mrs. Perlmutter's attorneys had been filing detailed motions and appearing in court to document numerous acts by Mr. Perlmutter that violated the rules of discovery or exceeded the bounds of advocacy. All the Schiller fee petition did was group the sanctionable activity according to the particular rule violated, an organization the court followed when drafting its letter opinion.

Sanctions were also appropriate for all the fees incurred by Mrs. Perlmutter for the spurious motion seeking a change of venue

to a different county. While the court initially decided that the *forum non conveniens* claim was warranted by law (as the contract claim was not), Mr. Perlmutter's actions proved that his actual claim of inconvenience was frivolous (App. 78); accordingly, fees were properly due for the entire venue proceeding. Similarly sound was the award of fees as a sanction for the Aspen condo rental situation, not for "questioning the fairness and propriety" of Mrs. Perlmutter's lease arrangements, but for Mr. Perlmutter's violating a court order (*see* C. 1291) directing him to pay the one-week rental cost for Mrs. Perlmutter's Aspen, Colorado vacation over the Christmas holiday. Finally, the court imposed sanctions on Mr. Perlmutter for seeking a court order for psychiatric treatment of the parties' son — not for requesting the treatment, but for refusing to utilize the consultation and mediation procedures contained in the parties' Joint Parenting Agreement, entered as an agreed order in 1988 (C. 578).

A trial judge is not relegated to being a mere referee who rules on specific issues presented at trial; he or she has a duty to control all the proceedings to the extent necessary to grant both parties a fair trial. *City of Danville v. Frazier*, 108 Ill. App. 2d 477, 248 N.E. 2d 129 (1969).

Obviously, the attorneys' fees Mr. Perlmutter was ordered to pay as sanctions for various abusive actions were not evidence of judicial bias and prejudice, but merely appropriate recompense to Mrs. Perlmutter's counsel for the hours spent in dealing with abusive tactics purposely chosen by Mr. Perlmutter and his attorneys. Such fees were justified even under Ill. Rev. Stat. 1989, ch. 40, § 508, Illinois' basic fee-shifting statute in matrimonial law cases. *In re Marriage of Ziemer*, 189 Ill. App. 3d 966, 546 N.E. 2d 229 (1989); *In re Marriage of Cotton*, 103 Ill. 2d 346, 469 N.E. 2d 1077 (1984); *Kuhns v. Kuhns*, 7 Ill. App. 3d 884, 288 N.E. 2d 884, 886 (1972). Consequently, even the Katz petition, which was initially brought under § 508 but later amended, appropriately

sought fees for conduct by Mr. Perlmutter that precipitated otherwise unnecessary court proceedings.

By now, nothing should be more clear than the baseless nature of Mr. Perlmutter's claims before this Court, claims that he cannot support except by serious misrepresentations of the facts of the case.

IV.

NORMAN PERLMUTTER'S CLAIM OF TRIAL COURT BIAS AND PREJUDICE IS NOTHING MORE THAN DISSATISFACTION WITH THE FINAL RESULT IN THE CASE.

It is axiomatic that entry of an adverse judgment, standing alone, is not evidence of prejudice on the part of a trial judge. *Nehring v. First National Bank in DeKalb*, 143 Ill. App. 3d 791, 493 N.E. 2d 1119 (1986). Mere allegations that a judge has made erroneous rulings against a party are not allegations of personal prejudice sufficient to support a motion for change of venue; neither is the fact that a judge's mind is closed on a point of law. *Palmisano v. Connell*, 179 Ill. App. 3d 1089, 534 N.E. 2d 1243 (1989).

In *United States v. Antonelli*, 582 F. Supp. 880, 881 (N.D. Ill. 1984), statements by a judge during a hearing that the defendant was the "most viciously antisocial person who has ever come before me," or that "society has been too lenient with you up to this point," were not grounds for disqualification of the judge on grounds of prejudice. Even a trial judge's post-trial comment that the defendant "is a no-good, cold-blooded killer that doesn't deserve to live" did not indicate that the judge was predisposed against the defendant during trial. *People v. Davis*, 95 Ill. 2d 1, 447 N.E. 2d 353, *cert. denied, Davis v. Illinois*, 464 U.S 1001, 104 S.

Ct. 507, *reh. denied*, 465 U.S. 1014, 104 S. Ct. 1017 (1983). Finally, if the judge *In re T.B., a Minor*, 195 Ill. App. 3d 919, 552 N.E. 2d 1107 (1990), who admonished the State to file a petition to terminate the Respondent's parental rights, was not found to be biased against the Respondent, how much less cause is there for Mr. Perlmutter to complain about the trial court's statement that it would consider all fees at one time, but that it expected the parties primarily to obviously bear their own responsibility for fees except for some arguable contribution for specific issues raised concerning discovery or other pre-trial actions (App. 120).

CONCLUSION

Ultimately, Mr. Perlmutter's Petition to this Court should be denied, not only for the obvious reason that he did have sufficient "meaningful" opportunity to raise the issue of judicial prejudice to the trial court, but also, and more fundamentally, because none of the so-called prejudiced behavior on the part of the trial court came close to qualifying as evidence of judicial bias. When the events of the trial and post-trial proceedings are viewed, not in the lurid colors Mr. Perlmutter tried to paint but as they actually occurred, the writ should be summarily denied.

Respectfully submitted,

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APPENDIX A —EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Proceedings of September 11, 1990

* * *

[5166] MR. SCHILLER: We have our own motion, for clarification, that we served on counsel today, that deals with the subject of attorneys' fees that was not covered in your opinion. We only provided in the judgment that should the parties wish to file a petition for attorneys' fees [5167] that they have 28 days to file such a petition . . .

* * *

[5170] MR. REUBEN: . . . On the attorney's fees, I understood by the court's silence and opinion it was intended, and I think originally [you] . . . intended to have both sides, each pay their own fees because in the first decree, formal decree sent to us it was silent on that. And it was — that's something I think people would not overlook, and it's [sic] now been raised at a very late date.

Again, however, the better — I think it — I correctly read the court's opinion of August, but you're a better expert of what your opinion is intended to do than anybody in the courtroom . . ."

* * *

[5212] MR. SCHILLER: We have now finished with everything other than the attorneys' fees which has come up.

THE COURT: I did not address the attorneys' fees in my letter. To a certain extent it was my desire not to address that issue

while I was dealing with all of the other complicated issues. Although, you all say that is something that could not possibly be overlooked, it was to some extent overlooked by me purposefully because I knew you wouldn't overlook it, and you would bring it to my attention and we would cover it. Therefore, you're given leave to file whatever petitions you wish with regard to whatever attorney's fees.

MR. JONES [Mrs. Perlmutter's prior attorney]: My petition — we have had a petition for fees [filed] since February of 1989 directed specifically against Norman Perlmutter and/or his counsel, and I would like some clarification as to how that particular subject is to be [5213] addressed.

THE COURT: How would you like to be addressed?

MR. JONES: If you're going to deal with that, you're dealing with the various petitions for fees, if that is your pleasure, that is — I could accept that, I want some specific ruling that is indeed what is going to take place.

MR. REUBEN: The thing — the Court's order was all fees be considered at one time.

THE COURT: That would be my intention. I would also sort of gratuitously say that I would expect that the parties would primarily bear their own responsiblity for fees, but I think there may be some arguments why there should be some contribution because of specific issues that you raise in your motion, for example, on discovery or whatever other reasons why they should be.

MR. REUBEN: This judgment is not final, as I understand the law.

THE COURT: That's right.

MR. REUBEN: We have raised —

THE COURT: I think that it is final for the purpose of computing the interest.

MR. SCHILLER: It's not appealable, but it's final. . . .

* * *

Proceedings of February 4, 1991

* * *

[R. 5426] MR. REUBEN: I have a statement.

MR. REUBEN: This late, as you know, in terms of this case, it's been a year — for a year. I would like to shorten it as much as possible. To that end, Mr. Stein [an attorney of the firm Schiller, Du Canto and Fleck] tendered to me today and tendered, I believe on Thursday or Friday affidavits [setting forth the attorney time spent on specified issues, taken from time slips] by [Kathryn Perlmutter's two prior attorneys] which set forth the information that they have and ask us to stipulate in lieu of their testifying. I would then, obviously, waive cross-examination. I'm prepared to stipulate as to those two gentlemen. That if they were put on the stand what their affidavit said that was sent to me was what they would testify to, and I'm prepared to waive my cross-examination of them.

I am also prepared in terms of the petitions [R. 5427] of both gentlemen, that is, the four gentlemen, Mr. Stein, Mr. Daw, Mr. Schiller [all of Schiller, Du Canto and Fleck] and Mr. Katz, they're all gentlemen. They all have petitions. I've prepared to agree — I

don't like to see lawyers on the stand very much — if they were called to the stand what is contained in their petition would be what they would testify to in order to shorten this proceeding. They want to amplify it or whatever they want to do, I'm prepared to agree, and then none of this that has to be repeated if that is agreeable with the Court.

THE COURT: Fine with me.

MR. KATZ: Fine with me. I assume then I would take the stand to be cross-examined?

THE COURT: Right. That is what I would expect. Is that correct?

MR. REUBEN: Yes, ma'am, but when it comes to Mr. Schiller, I see he is not here, I'll waive my cross examination of Mr. Schiller. He doesn't have to come.

MR. STEIN: Fine. I'm sure he'll be glad to know that. We have time set for tomorrow.

* * *

[5438] MR. STEIN: It was our understanding based on the court's ruling on our motion for clarification that the primary responsibility for the payment of attorneys' fees would fall on the respective parties themselves with certain exceptions, or certain possible exceptions, those being issues where the court had previously found sanctionable activity to exist, or a reservation for future hearing on sanctions. And, secondly, where the lawyers felt that there may have been abuses of discovery during the pendency of the case. We attempted to isolate and identify those issues where we felt that specific abuses of discovery had occurred. They're

more specifically delineated and identified in our petition. If you want me to go through them, I can.

Q. [MR. REUBEN]: No, No, I don't think we're meeting —

A. [MR. STEIN]: Well, you asked me how. I want to explain how [we] did it.

Q. [MR. REUBEN]: Did you look at all the time sheets to extrapolate that out?

A. [MR. STEIN]: Once we identified the issues, we then went to the time records themselves and pulled from the time records those entries which we felt corresponded to the particular issue upon which we thought an abuse of [R. 5439] discovery had taken place.

* * *

[5507] MR. STEIN: I didn't know exactly how the court wanted us to proceed with this petition. One of the things that preliminarily the court suggested and we accepted was that we would stand on our petition, and not go into each and every allegation and match time slips to the allegations themselves, but merely submit ourselves to cross examination.

During direct — during redirect, I believe Mr. Daw asked me if, in fact, the time records that are attached as an exhibit accurately reflect the time we expended on those issues, and they do. I said that they did.

In preparation for our direct testimony — I have no problems in sharing this with the court — we took our exhibit. The only reason we didn't do that is the court asked us to stand on the exhibit

itself rather than go through line by line.

[R. 5508]: MR. REUBEN: I'll object. The court never asked you to stand on the exhibit. I suggested and you agreed to doing that. Now he's trying to open — reopen the case and put in an exhibit that I have never seen that he wants to share with the court.

* * *

[MR. STEIN] Proofs are closed. My closing reply is not. And I'll offer to do it either as an exhibit, or I'll, in my reply, respond to Mr. Reuben's allegation and go through each and every one and tell you what each time [R. 5509] slips [sic] relates to in terms of the issue as enunciated in the pleading.

MR. REUBEN: I'll object — He should have done that by testimony. That was — he's trying to enhance his time sheets which are deficient in closing argument. When I pointed out — and trying to enhance today a contemporaneous record of two — one year ago. If the court let's [sic] him, I have no way of stopping, just make my record. I have no way of dealing with that now. He was on the stand. He could have had all sorts of opportunities to do so. He had to do — his petition should have done so. Wasn't done. He's going to do it at this late hour or attempt to do it by closing argument. Getting back. I don't know how. It's improper.

THE COURT: . . . Apparently, there were expectations as to what was going to be relied upon with regard to the affidavit and how it would relate to the petition. And my expectation was that on cross examination if you had some questions about how the time was related to their petition, then you could have an opportunity to go into it. If that expectation was not the same expectation as you had, then we'll start again tomorrow, and I'll declare a mistrial on the petition for [R. 5510] attorneys' fees.

MR. REUBEN: Well, I would like to respond. I think your Honor, that I am entitled, if the proof is defective, not to cross examine and open it up.

THE COURT: I'm declaring a mistrial. We'll start again tommorrow.

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[R. 5534] THE COURT: . . . Now that's why we're starting over again. Because there have been allegations also of some sharp practices and I think that would maybe be the kindest way I could describe some of what went on in this case. And I don't think that should go unnoticed by the court. And that is why I'm conducting this hearing.

Now, I want to know what happened, why you [5535] think that conduct was conduct that should be — have sanctions assessed. That should be the first level of inquiry. And then the second level should be what fees were generated by that conduct.

* * *

MR. REUBEN: I simply want to state for the record that I believe that the law is that when your Honor imposes sanctions, which is a penalty, that there must be the burden on the people seeking the sanctions to prove their case by clear and convincing evidence.

And that if they don't do so, it is not my obligation to anybody, especially my client, to try to enhance the failure of proof or make their case for them.

THE COURT: I accept your position, Mr. Reuben. And to a certain extent I think you have a valid point.

MR. REUBEN: Thank you.

THE COURT: But I think where my displeasure yesterday came in was from the fact that — maybe I'm going to be repeating myself — but there have been allegations [5536] of practices that I think the court needs to take some notice of. And it's not merely to compensate Mrs. Perlmutter for the additional attorneys' fees that she may have had to expend, but it's for the administration of the system and the way lawyers conduct themselves in this court. And some very serious allegations have been made and I want to have this investigated. So it's beyond just sanctions for recompensing Mrs. Perlmutter.

MR. REUBEN: Your Honor, I couldn't agree with you more, what has been said about the lawyers who represent Mr. Perlmutter. I have practiced law 39 years and I have never been accused of the kind of things that I have been accused of — have been made the subject of accusations in this courtroom. And I'm delighted to stand on the record. I simply think that people make such accusations and claims there was a continuing course of conduct. They should have kept their records. And they should not have had the perfunctory hearing that they had yesterday. And their charging the lawyers — your Honor, has previously held in this case, and I disagree with you — that she has no jurisdiction over the lawyer's conduct in terms of a license and what have you. You recall that. I don't agree with that. I think that this does impact on all of our licenses on this side of the table. I think what is [5537] happening is very serious in terms of the charges, and I think it's unfortunate that it's taken this long for this matter to come before the court since the entry of the orders in September adjudicating the rights of the parties. But so be it. And as the record shows this is a hearing that was requested by the Court. And I'm — deeply conscious and sensitive to the issues that are being presented here by these parties. And it impacts on my license, Mr. Feiwell's

license, Mr. White's license, and Mr. Starkopf's license, indeed, Mr. Pedersen and Mr. Janser's licenses. I want the court to know I don't take it lightly at all.

MR. DAW: Judge, there is an attempt being made that were you to grant fees in this action for these reasons their position is you then have to turn them into the A.R.D.C. and take their license away from them, et cetera. That's what they're really trying to threaten you with.

THE COURT: I heard that also. And that was another source of displeasure for me yesterday. That somehow it would be better for me if I were not to find their [sic] to be reprehensible conduct, however you want to describe it, because if I were to find that kind of conduct, then I might find myself in a Himmell situation. [5538] I thought that to be an inappropriate argument.

MR. REUBEN: I don't think I said that. I think I'll stand by the record as to what I said your Honor.

MR. DAW: This petition, to make the record crystal clear, is pursuant to what we claim to be discovery pursuant to section 219, [Resp. App. 18a] pursuant to the orders, all of the entered sanctions relative to 2 — 611 [Resp. App. 11a] on the venue issue, relative to conduct bringing Harry back into these proceedings without the benefit of mediation. The whole issue involving Mr. Doherty. The disclosure of alleged confidential information that our experts and that we had been seeking for approximately 14 months, that they had, in turn, surrendered to their experts. Those are the issues. That is not one which means that the court or the attorneys are required to tender Mr. Reuben, Mr. Feiwell, Mr. Starkopf, Mr. Starkman, Mr. Harvey, Mr. White, Mr. White from Chicago, to the A.R.D.C. that is what they want it to be, but it's not. This is a case of over

zealousness. Over zealousness. Taking advantage of the situation, making misrepresentations of fact and law to the court and taking totally contrary positions which was totally abuse of the discovery process. They came into the court repeatedly and said, judge, look how magnanimous we're being. We're giving them thousands of documents, and gave you a big list. What they didn't tell you is if we didn't know exactly the document we were looking for, or the exact subject matter, they weren't going to help us. So we sat in rooms full of boxes full of documents trying to find the one specific document . . ."

APPENDIX B — RELEVANT STATUTES & RULES

TEXT OF ILL. REV. STAT. 1989, CH. 110. § 2-611

2-611. Signing of pleadings, motions and other papers — Sanctions

§ 2-611. Signing of Pleadings, Motions and Other Papers; Sanctions. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need to be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Section, the court, upon motion or upon its own initiative, shall impose upon the person

who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

* * *

All proceedings under this Section shall be within, and part of the civil action in which the pleading, motion or other paper referred to herein has been filed, and no violation or alleged violation of this Section shall give rise to a separate cause of action, or another cause of action within the civil action in question, by, on behalf of or against any party to the civil action in question, and by, on behalf of or against any attorney or insurance company involved inthe civil action in question.

TEXT OF ILL. REV. STAT. 1989. CH. 110. § 2-1303

2-1303. Interest on Judgment

§ 2-1303. Interest on judgment. Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied or 6% per annum when the judgment debtor is a unit of local government, as defined in Section 1 of Article VII of the Constitution, a school district, a community college district, or any other

governmental entity. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the unsatisfied portion of the judgment as it exists from time to time. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment.

PARTIAL TEXT OF ILLINOIS SUPREME COURT RULES 201(a),(b),(k), 219, 220

PART E. DISCOVERY, REQUESTS FOR ADMISSION, AND PRETRIAL PROCEDURE

201. (Supreme Court Rule 201). General Discovery Provisions

(a) Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral or written questions, written interrogatories to parties, discovery or inspection of documents or property, and physical and mental examination of persons. Duplication of discovery methods to obtain the

same information should be avoided.

(b) Scope of Discovery.

(1) *Full Disclosure Required.* Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any document or tangible things, and the identity and location of persons having knowledge of relevant facts. The word "documents," as used in these rules, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, and communications.

(2) *Privilege and Work Product.* All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. The court may apportion the cost involved in originally

securing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just.

* * *

(k) Reasonable Attempt to Resolve Differences Required. Every motion with respect to discovery shall incorporate a statement that after personal consultation and reasonable attempts to resolve differences the parties have been unable to reach an accord. The court may order that reasonable costs, including attorneys' fees, be assessed against a party or his attorney who unreasonably fails to facilitate discovery under this provision.

220. (Supreme Court Rule 220). Expert Witnesses

* * *

(b) Disclosure.

(1) *Expert Witness.* Where the testimony of experts is reasonably contemplated, the parties will act in good faith to seasonably:

(i) ascertain the identity of such witnesses, and

(ii) obtain from them the opinions upon which they may be requested to testify.

In order to insure fair and equitable preparation for trial by all parties the identity of an expert who is retained to render an opinion at trial on behalf of a party must be disclosed by that party either within 90 days after the substance of the expert's opinion first becomes known to that party or his counsel or, if the substance of the expert's opinion first becomes known to that party or his counsel or, if the substance of the expert's opinion is then known, at the first pretrial conference in the case, whichever is later. In any event, as to all expert witnesses not previously disclosed, the trial court, on its own motion, or on the motion of any party after the first pretrial conference, shall enter an order scheduling the dates upon which all expert witnesses, including rebuttal experts, shall be disclosed. The schedule established by the trial court will sequence the disclosure of expert witnesses in accordance with the complexities of the issues involved and the burdens of proof of the respective parties as to those issues. All dates set by the trial court shall be chosen to insure that discovery regarding such expert witnesses will be completed not later than 60 days before the date on which the trial court reasonably anticipates the trial will commence. Upon disclosure, the expert's opinion may be the subject of discovery as provided in paragraph (c) hereof. Failure to make the disclosure required by this rule or to comply

with the discovery contemplated herein will result in disqualification of the expert as a witness.

(2) *Consulting Expert.* Except as provided in paragraph (c)(5) hereof, a party need not disclose the identity of a consulting expert.

(c) Discovery.

(1) Upon interrogatory propounded for that purpose, the party retaining or employing an expert witness shall be required to state:

(i) the subject matter on which the expert is expected to testify;

(ii) his conclusions and opinions and the bases therefor; and

(iii) his qualifications.

(2) The party answering such interrogatories may respond by submitting the signed report of the expert containing the required information.

(3) A party shall be required to seasonably supplement his answers to interrogatories propounded under this rule as additional information becomes known to the party or his counsel.

(4) the provisions of paragraphs (c) and (d) hereof also apply to a party or an employee of a

party who will render an opinion within his expertise at the time of trial.

219. (Supreme Court Rule 219). Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences

(a) Refusal to Answer or Comply with Request for Production. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on notice to all persons affected thereby, he may move the court for an order compelling an answer. If a party or other deponent refuses to answer any written question upon the taking of his deposition or if a party fails to answer any interrogatory served upon him, or to comply with a request for the production of documents or tangible things or inspection of real property, the proponent of the question or interrogatory or the party serving the request may on like notice move for an order compelling an answer or compliance with the request. If the court finds that the refusal or failure was without substantial justification, the court shall require the offending party or deponent, or the party whose attorney advised the conduct complained of, or either of them, to pay to the aggrieved party the amount of the reasonable expenses incurred in obtaining the

order, including reasonable attorney's fees. If the motion is denied and the court finds that the motion was made without substantial justification, the court shall require the moving party to pay to the refusing party the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

* * *

(c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) that further proceeding be stayed until the order or rule is complied with;

(ii) that the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) that he be debarred from maintaining any particular claim,

counterclaim, third-party complaint, or defense relating to that issue;

(iv) that a witness be barred from testifying concerning that issue;

(v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his action be dismissed with or without prejudice; or

(vi) that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.

In lieu of or in addition to the foregoing, the court may order that the offending party or his attorney pay the reasonable expenses, including attorney's fees incurred by any party as a result of the misconduct, and by contempt proceedings compel obedience by any party or person to any subpoena issued or order entered under the rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.